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Supreme Court of the United States

DELORES A. ZARNOW, Independent Administratrix for the Estate of Dr. Allen J. Zarnow, Deceased,
Petitioner,

v.

CITY OF WICHITA FALLS, TEXAS; CHIEF OF POLICE KEN COUGHLIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 14, 2011

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QUESTIONS PRESENTED

1. Does the law-of-the-case doctrine require a district court to consider prejudice to a party before reversing its own non-final decision issued in that party's favor?*

2. To establish a "custom" constituting official policy for municipal liability under 42 U.S.C. § 1983, must a plaintiff provide evidence of a pattern of specific prior instances of unconstitutional conduct if municipal officers have conceded that it was their practice to engage in such conduct?**

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* A related question regarding the law-of-the-case doctrine is pending in *United States v. Pepper*, No. 09-6822, argued Dec. 6, 2010.

** A similar question regarding "pattern" requirement was recently argued in this Court in *Connick v. Thompson*, No. 09-571, cert. granted, Mar. 22, 2010

PARTIES TO THE PROCEEDING

DELORES ZARNOW, Independent Administratrix of the Estate of Dr. Allen J. Zarnow, Deceased, Petitioner.

CITY OF WICHITA FALLS, TEXAS, and WICHITA FALLS POLICE DEPARTMENT CHIEF KENNETH COUGHLIN, in his official capacity, Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Delores Zarnow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 614 F.3d 161 and is reproduced in the Appendix at 1a. The decision of the U.S. District Court for the Northern District of Texas is reported at 640 F. Supp. 2d 844 and is reproduced in the Appendix at 20a.

JURISDICTION

The court of appeals issued its judgment on August 9, 2010. Pet. App. 40a. The court denied petitioner's timely petition for rehearing on November 15, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Pet. App. 42a.

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In the current case, Dr. Allen Zarnow filed an action pursuant to 42 U.S.C. § 1983 against the Respondents and members of the Wichita Falls Police Department, premised upon violations of the Second, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and arising out of law enforcement response to a claim by Dr. Zarnow's co-workers that Dr. Zarnow possessed illegal weapons and/or explosives in his clinical office. The individual police officers and Police Chief Kenneth Coughlin in his individual capacity have been dismissed from the suit or released from the litigation on qualified immunity grounds. Dr. Zarnow's claims against the City of Wichita Falls and Chief Coughlin in his official capacity are the subject of this Petition.

Dr. Allen Zarnow was a practicing physician with the Clinics of North Texas in Wichita Falls, Texas. Dr. Zarnow was an avid collector of guns and coins. In the summer of 1999, he went on vacation with his family. Approximately two weeks before his scheduled return, his nurse requested that a janitor repair Dr. Zarnow's desk, which was located in his locked office within the Clinic. Under the desk and behind some loose trim was located a gun, a magazine, and boxes of shells. The nurse and her supervisor notified the Clinic's president, who told her to leave the items alone. Two weeks later, before Dr. Zarnow returned to work, the leadership of the Clinic re-entered Zarnow's office, unlocked his desk, and located some more ammunition and some material that appeared to be fuses or blasting caps. None of the items were active explosive devices. The Clinic leadership and counsel contacted law enforcement.

Firefighters and police officers responded to the Clinic and observed the items found. The Chief of Police also responded and after a warrant-less search of Dr. Zarnow's Clinic office, ordered his officers to obtain a search warrant for Zarnow's locked file cabinet, located inside his office, and for Zarnow's home. Pet. App. 48a; R. 2750. While waiting for the warrants to be issued, officers conducted surveillance of Zarnow's home and noticed that he was at home. R. 2022. Officers made telephone contact with Zarnow and asked that he exit his home, which he did. Then police officers asked that he step back inside his house and asked if he had loaded weapons in the home. Zarnow responded that he did and told the officers where they were. Police officers conducted a protective sweep of Zarnow's home and secured those weapons and requested that Zarnow accompany them to the police station. Once there, Zarnow was interrogated by an officer with the City of Wichita Falls Police Department and an agent from the Fort Worth office of the Bureau of Alcohol, Tobacco, and Firearms. Zarnow informed the two that he had the necessary registration and paperwork for all of his weapons that required it. Zarnow offered to show those two his paperwork, which was located within his home.

Zarnow consented for the one police officer and one of four ATF agents from the Fort Worth office to enter his home for the purpose of inspecting his collection of weapons and his paperwork. R. 2203. However, several other officers entered the home and conducted a full search of the home for the next several hours. After the ATF agent was satisfied that Dr. Zarnow's weapons registration and paperwork was in order, she and her fellow ATF agents left Zarnow's home and returned to Fort Worth. Dr. Zarnow attempted to

withdraw his consent to search his home and asked the officers to leave. However, the City's officers informed him of the previously obtained warrant and continued to search and seize his property over Dr. Zarnow's objection. Over the next few days, more than 35 officers led, directed, or supervised by Chief Coughlin, conducted multiple searches where more than searched 4000 items were seized from Zarnow's home, lake house, and office, including ammunition, shotguns, revolvers, stun guns, medication, band-aids, currency, silver, gold, and books. R. 591. The vast majority of these items were not listed in any application for a search warrant. Police officers justified the seizure of these items by citing to the "plain-view" doctrine. The Police Chief and other high-ranking, long-term officers of the Wichita Falls Police Department testified that they understood the "plain-view" doctrine to permit the collection of any item that might be evidence of a crime, and that they did not believe probable cause was required to justify the seizure of such items. Pet. App. 32a–37a. Chief Coughlin testified that it was the practice of the Wichita Falls Police Department to seize more than was necessary during an initial search, so he could later "rule things in or out." R. 2846-47.

The next morning, Police Chief Coughlin assembled the firearms and ammunition that were seized from Zarnow and laid them in an array before the local media. R. 2251 Zarnow was arrested for possession of prohibited weapons. He was later no-billed by the Wichita County Grand Jury, and all charges against Dr. Zarnow were dismissed. After the charges against him were dismissed, Dr. Zarnow demanded return of the items seized, most of which were returned, but many remain lost or unaccounted for. Dr. Zarnow

then sued the City of Wichita Falls, its Police Chief, and several individual officers, seeking compensation for the loss and/or destruction of his personal property, compensation for his health-related damages, and punitive damages. In 2006, Dr. Zarnow died, and his wife, Delores Zarnow, substituted as Plaintiff in her capacity as Independent Administratrix of his estate.

In 2006, the United States District Court for the Northern District of Texas, Wichita Falls Division, considered the first round of summary judgment motions. In its decision, the District Court denied the City of Wichita Falls's and Chief Coughlin's motion for summary judgment. R. 2222–23. The City did not challenge the summary judgment by filing a motion for reconsideration under either Federal Rule 59 (e) or 60 (b). Rather the City filed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. A panel of that court determined that it did not have jurisdiction of the City's appeal and dismissed it.

On remand, Dr. Zarnow file a partial motion for summary judgment on the undecided legal issue of whether Chief Coughlin was a policymaker. The remaining Defendants (the City of Wichita Falls and Chief Coughlin in his official capacity) filed a response and also filed a second motion for summary judgment. The City of Wichita Falls presented a reworded, but substantially identical, motion for summary judgment, with no new evidence or change in the law. Zarnow relied to her detriment on the first District Court ruling on the City's motion and did not repeat the same arguments already presented or present the same evidence in rebuttal for the second time. The District Court resolved the policymaker issue finding that Chief Coughlin was a potential policymaker for

the city, but granted summary judgment for the City and Coughlin on the City's second round of summary judgment motions, without providing notice to Zarnow that it intended to revisit its prior denial of the City's motion for summary judgment and without giving any reason for the change in its decision. The District Court simply held "[N]egligence or stupidity alone does not make the city liable." Pet. App. 39a.

Dr. Zarnow filed a Rule 59 (e) motion to reconsider arguing the law of the case doctrine and the City's liability for the unconstitutional wrongs by its final policymaker. The trial court denied Dr. Zarnow's motion. Pet. App. 49a.

Dr. Zarnow appealed to the Court of Appeals for the Fifth Circuit, who affirmed. The Court of Appeals rejected Zarnow's argument that the law of the case regarding the City's requests for summary judgment precluded the District Court from granting summary judgment for the City without inquiring into the prejudice Zarnow might suffer or providing any reason for revisiting its prior decision. Pet. App. 16a–17a. The Court of Appeals also rejected Zarnow's argument that the policy or custom of the City of Wichita Falls with regard to seizing personal property outside the scope of a warrant was unconstitutional, reasoning that the testimony of the Chief and other officers occurred years after the seizures of Zarnow's property and that additional evidence of a pattern would be required to establish official policy. Pet. App. 11a–12a. The Court of appeals also rejected Dr. Zarnow's argument that the City was liable for the unconstitutional acts by the City's policymaker Chief Coughlin. Pet. App. 14a. The Court of Appeals denied Zarnow's motion for rehearing. Pet. App. 42a.

Zarnow now respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Zarnow respectfully requests that this Court grant his petition for two reasons: first, the Fifth Circuit Court of Appeals has declined to apply the law-of-the-case doctrine to a second motion for summary judgment filed by the City of Wichita Falls without regard to the prejudice he suffered by the consideration of that second motion without giving Zarnow notice of the district court's intent to consider the same issue without additional evidence.

Second, the Fifth Circuit Court of Appeals has unfortunately misapplied the applicable law regarding the proof required to establish a municipal policy – or at least a fact question about the existence of such municipal policy – and created an illogical bar to legitimate claims for relief.

I. Law-of-the-case

A. The Circuits are divided as to whether a district court may change its summary-judgment denial without considering prejudice to the party that initially prevailed.

1. Overview of law-of-the-case

The law of the case doctrine expresses the general rule that courts will not reopen issues that have already been decided. The doctrine suggests that "when a court decides upon a rule of law, that decision

should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). A court has the power to revisit its prior decision, but should be loathe to do so in the absence of extraordinary circumstances, such as where the initial decision was "clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8 (citation omitted); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

2. Varying approaches in the circuits

Some courts have held that summary judgment cannot be revisited without some new basis. *See, e.g., Wechsler v. Hunt Health Sys. Ltd.*, 198 F. Supp. 2d 508, 514 (S.D.N.Y. 2002) ("[A] party may renew its motion for summary judgment as long as it is supported by new material," but issues decided in first decision comprise "law of the case" and may not be "revisited."); *Jackson v. Norris*, 748 F. Supp. 570, 571, 574-575 (M.D. Tenn. 1990), *aff'd without opinion*, 928 F.2d 1132 (6th Cir. 1991) (stating that repetitive summary judgment motions are generally barred by the law of case doctrine, but additional summary judgment motions on different issues are permitted; second summary judgment motion on different grounds permitted in civil rights case alleging violations of 42 U.S.C. § 1983); *In re Midwest Milk Monopolization Litig.*, 380 F. Supp. 880, 884 (W.D. Mo. 1974) (holding that a second summary judgment based on same legal theories was subject to law of case principle and subject to automatic denial, but court independently determined to deny second motion on its merits in antitrust case). When summary judgment is denied for lack of sufficient facts to support summary judgment and conclusory arguments that do not

resolve any factual issues for which the court had sought illumination are presented on a second motion for summary judgment, the second motion is "fatally flawed." *Talarico v. Marathon Shoe Co.*, 221 F. Supp. 2d 35, 39 (D. Me. 2002); *see also Wechsler*, 198 F. Supp. 2d at 514. If a judge is presented with additional evidence or needs to clarify substantive law, a renewed motion for summary judgment may be considered. *Curran v. Kwon*, 153 F.3d 481, 487 (7th Cir. 1998); *Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 171 (5th Cir. 1990).

However, other courts have held that the law of the case doctrine does not even apply to summary judgment denials. *See, e.g., Aycock Eng'g Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1356 (Fed. Cir. 2009) ("Mr. Aycock misunderstands the law of the case doctrine, which simply does not apply to a denial of summary judgment."); *see also Bethlehem Steel Export Corp. v. Redondo Constr. Corp.*, 140 F.3d 319, 321 (1st Cir. 1998) (holding that denial of summary judgment does not constitute the law of the case and does not preclude the reconsideration of an issue that was already settled); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 251 (D.C. Cir. 1987) (holding that the law of the case doctrine does not bar a district court from granting a motion for summary judgment after a prior order denying summary judgment without prejudice); *Mosley v. City of Northwoods*, 415 F.3d 908, 912 (8th Cir. 2005) (stating that a district court is free to reconsider its earlier rulings where it believes that an earlier decision was reached in error to avoid later reversal); *Gander Mt. Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008) (holding that the law of the case doctrine does not apply to interlocutory orders).

However, in most of the cases in which the reconsideration of a denial of summary judgment is permitted, some inquiry as to the reason for a subsequent motion is required. *See, e.g., Wechsler v. Hunt Health Sys.*, 198 F. Supp. 2d 508, 514 (S.D.N.Y. 2002) (holding that a party may renew a motion for summary judgment so long as it is supported by new material); *Ellis v. United States*, 313 F.3d 636, 647-48 (1st Cir. 2002) (stating that narrow exceptions to the law of the case doctrine exist if the initial ruling was made on an inadequate record or was designed to be preliminary, if there has been a material change in controlling law, if there is newly discovered evidence bearing on the question, and if it is appropriate to avoid manifest injustice); *Curran v. Kwon*, 153 F.3d 481, 487 (7th Cir. 1998) (holding that when a district judge is presented with new evidence, the court is free to revisit its denial of summary judgment); *Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 171 (5th Cir. 1990) (holding that a new decision clarifying the substantive law in the case could support a renewed motion for summary judgment); *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993) (allowing a reconsideration of a previous denial of summary judgment where additional evidence constituted a changed circumstance supporting the district court's discretion to depart from the law of the case); *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1285 (11th Cir. 2005) (holding that where "different evidence, different issues" existed, the reversal of a first entry of summary judgment is warranted); *Williamsburg Wax Museum*, 810 F.2d at 251 (holding that after additional evidence was produced, the district court was not bound by its earlier denial of summary judgment).

3. In conflict with other circuits, the decision below held that summary-judgment rulings could be changed without regard to the prejudice to a party.

In this case, the District Court granted the City of Wichita Falls's second motion for summary judgment even though it had previously denied the substantially identical motion years before. The District Court did not specify its reasons for reversing its own decision nor did the District Court inquire into the prejudice the non-moving party might suffer if it reversed its decision without notifying the non-moving party that it intended to revisit that decision. The Fifth Circuit Court of Appeals affirmed this second ruling on summary judgment, without requiring a reason for the reversal of the prior decision and without requiring an inquiry into the prejudice the non-moving party suffered, largely ignoring Zarnow's argument that she did, in fact, suffer prejudice.

This is in conflict with the Fifth Circuit's own holdings directly on point and with other law regarding notice and prejudice. First, as presented *supra*, some reason is required before a court can revisit its prior decisions on the same point. The Fifth Circuit Court of Appeals did not require any reason by this district court. The Fifth Circuit panel excerpted the opinion in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), as "'A court has the power to revisit prior decisions of its own . . . in any circumstance . . . .'" *See Zarnow v. City of Wichita Falls*, 614 F.3d 161, 171 (5th Cir. 2010). However, the words omitted by the Fifth Circuit Panel are crucial; the full holding is: "A court has the power to revisit prior decisions of its own or of a coordinate court in

any circumstance, *although as a rule courts should be loathe to do so in the absence of extraordinary circumstances, such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'* *See Christianson*, 486 U.S. at 817 (citing *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (emphasis added). The Fifth Circuit panel wholly ignored this "rule." No extraordinary circumstances were cited by the district court or found by the court of appeals.

Second, the District Court was required to give notice to the non-moving party before it revisited its prior decision. If a judge changes an initial ruling, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue; failure to do so may cause substantial prejudice. *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989); *see also Alberty-Velez v. Corporacion de P.R. Para la Diffusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001) (holding that the district court erred by allowing relitigation on a legal question decided before trial without providing appropriate notice to the non-moving party). Here, Zarnow relied on the prior denial of summary judgment to the City of Wichita Falls. Though the district court entered an order permitting additional motions for summary judgment after remand, the district court did not provide notice to Zarnow that it would be reconsidering the prior order; therefore, Zarnow did not marshal the same proof and arguments previously presented in opposition to the substantially identical motion that was already presented and decided in her favor.

Third, the District Court was required to make an inquiry as to the prejudice that may befall the non-moving party if it were to revisit the prior holding. The Fifth Circuit Court of Appeals itself has held that a district court's discretion to reconsider summary judgment is not "limitless." *See Lavespere v. Liberty Mutual Ins. Co.*, 910 F.2d 167, 172-74 (5th Cir. 1990). In that case, the Fifth Circuit Court recognized that the Federal Rules of Civil Procedure do not recognize a "motion for reconsideration" of summary judgment. *Id.* at 173. Therefore, the timing of the motion will dictate whether the motion is treated under Rule 59(e) or 60(b). *Id.* If the motion is filed after ten days from the district court's ruling, the motion is treated as a motion for relief from judgment under Rule 60(b). *Id.* In determining whether the moving party has established "excusable neglect" or manifest injustice, the district court enjoys "considerable discretion;" however, that discretion is not boundless. *Id.* The court must consider, among other things, "the reasons for the moving party's default" and "the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened." *Id.* at 174. Here, the City did not couch its motion in terms of a relief from judgment or reconsideration; it simply filed a second motion for summary judgment after failing in its first attempt. The reasoning behind the Fifth Circuit's holding in *Lavespere* remains sound – the nonmoving party should not be prejudiced by the reconsideration of an issue that was already settled. *See also Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387 (2d Cir. 1989); *Alberty-Velez v. Corporacion de P.R. Para la Diffusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001); *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995); *Mosley v. City of Northwoods*, 415 F.3d 908, 912 (8th Cir. 2005). In this

case, however, neither the district court nor the court of appeals considered whether the reconsideration would prejudice Zarnow. The Fifth Circuit Court of Appeals has, in essence, created a loophole for those who fail to put their best foot forward in the first motion. The Fifth Circuit has told those litigants simply to re-file their motions for summary judgment, avoid terms like "reconsideration" or "relief from judgment," and prevent any inquiry into the prejudice that might befall the non-movant or into the reasons for their failures to present their best argument and/or evidence the first time. *Compare Zarnow v. City of Wichita Falls*, 614 F.3d 161, 171 (5th Cir. 2010), *with Lavespere*, 910F.2d at 172-74.

Finally, the Fifth Circuit Court of Appeals opinion in this case undermines the policy behind the law of the case doctrine. It is a rule of convenience that is designed to prevent the unnecessary reconsideration of previously decided issues. *See Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983). Further, a fundamental precept of common law adjudication is that an issue is conclusive once it has been determined by a competent court. *Arizona v. California*, 460 U.S. 605, 619 (1983). A piecemeal consideration of successive motions for summary judgment is certainly disapproved. *Allstate Fin. Corp. v. Zimmerman*, 296 F.2d 797, 799 (5th Cir. 1961). Here, once the case was remanded, Zarnow saw the path to the courthouse as having been finally cleared. Instead, the City rehashed the same motion it had already presented and lost, without new evidence or any argument of a manifest injustice, and the district court inexplicably and without notice reversed its own opinion. As mentioned previously, this reversal was not at the prompting of any higher court; the Fifth Circuit poured

out the City's appeal for want of jurisdiction. Instead of fostering convenience and faith in the stability of the principles of law, the district court prejudiced Zarnow greatly in failing to even give the opportunity to present evidence or argument on the issues that Zarnow already won.

B. This is an important federal question.

As outlined *supra*, the circuits are split as to the applicability of the law of the case doctrine in the summary judgment arena, and the Fifth Circuit Court of Appeals has failed to consider the entirety of this Court's statements on the subject or its own rulings with regard to the topic. Therefore, to clarify confusion and to prevent injustice, this Court should review the Fifth Circuit's holding in this regard.

C. At the very least, this Court should hold this petition pending the decision in Pepper, which raises a similar question regarding law of the case.

A law of the case question was recently argued in this Court in *United States v. Pepper*, No. 09-6822. Br. of Petitioner at 52 ("Pursuant to this doctrine, parties to litigation are normally entitled to expect that 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.'" (citing *PNC Fin. Servs. Group, Inc. v. Comm'r of Internal Revenue Serv.*, 503 F.3d 119, 126 (D.C. Cir. 2007) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc))), *Pepper v. United States*, 570 F.3d 958 (8th Cir. 2009), *cert. granted*, No. 09-6822 (U.S. June 28, 2010). Therefore, though the underlying facts are different, the principles and

applications of those principles are substantially similar; therefore, the Court should hold this petition pending decision in *Pepper*.

II. Requiring specific instances of a prior pattern of conduct to establish a custom.

A. Zarnow has proved that the City of Wichita Falls has a municipal policy that is unconstitutional and that a causal link exists between the policy and the violation of Zarnow's constitutional rights.

1. Chief Coughlin is a policymaker and promulgated the City of Wichita Falls policy regarding plain view seizures.

The Fifth Circuit held that the City of Wichita Falls "impliedly delegated its policymaking authority to the chief of police" – Coughlin. *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168 (5th Cir. 2010). Pet. App. 11a. On the evidence presented, the chief of police of the City of Wichita Falls "is the sole official responsible for internal police policy." *Id.*

An official policy is a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Webster v. City of Houston*, 735 F.2d 838, 841(5th Cir. 1984) (en banc). The Fifth Circuit held, in this case, that Coughlin is the official to whom the lawmakers of the City of Wichita Falls delegated policy-making authority. *Zarnow*, 614 F.3d at 168. If Chief Coughlin had the

authority to unilaterally promulgate the more formal, written General Orders that embody City of Wichita Falls policy regarding various matters of police procedure and constitutional adherence, he also has the authority to unilaterally enact more informal policies regarding police procedure and constitutional adherence. *See, e.g., Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

Official policy can also be a "persistent, widespread practice of city official or employees, which . . . is so common and well settled as to constitute a custom that fairly represents municipal policy." *Webster*, 735 F.2d at 841. "[L]ocal governments . . . by the very terms of the statute, may be sued for constitutional deprivations pursuant to governmental 'custom' even though such custom has not received formal approval through the body's decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

In this case, Zarnow presented uncontroverted proof that Coughlin testified to the procedure employed by the City of Wichita Falls when seizing property that is not listed in a search warrant. Coughlin also testified as to the reasoning behind seizing Zarnow's personal property as being in accordance with that previously defined procedure. Zarnow presented uncontroverted testimony of other veteran officers of the Wichita Falls Police Department who echoed that same procedure. Either Coughlin officially enacted the policy or all of the officers understood the policy as their custom. The fact that the testimony was given years after the seizure of Zarnow's property is immaterial because each officer testified that Zarnow's personal property was seized pursuant to and due to this same policy.

Because Zarnow presents evidence and direct testimony of the existence of the custom, a pattern is not required. If a plaintiff is attempting to amass circumstantial evidence of an unconstitutional practice or custom, it is understandable that many incidents would be required. *See, e.g., Pindea v. City of Houston*, 291 F.3d 325, 328-29 (5th Cir. 2002). However, as here, where the policy is proved by the defendants, proof of incidents involving other citizens is unnecessary. *See, e.g., Pineda*, 291 F.3d at 328-29; *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001); *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Zarnow proved a deliberate municipal evasion of the Constitution. *Praprotnik*, 485 U.S. at 127.

Further, when a police officer testifies that he thought he was acting according to government policy or custom, as each of the officers who were deposed or who provided affidavits in support of the various motions for summary judgment filed by the Respondents or other defendants whom have since be released from the litigation, and there is no evidence presented that what was done by the officers was anything other than government policy or custom, none of which has ever been produced by the City of Wichita Falls, and the government maintains that the officer's actions were proper, as the City has consistently done, a plaintiff need not produce further evidence of policy or custom in order to prevail on that issue. *See Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir. 1987).

2. The policy of the City of Wichita Falls is unconstitutional.

The requirements for a valid warrantless seizure of allegedly incriminating items have been outline by this Court in *Horton v. California*, 496 U.S. 128 (1990), and in *Arizona v. Hicks*, 480 U.S. 321 (1987). "It is of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton*, 496 U.S. at 136. This point is conceded in this case. Therefore, the issue in this case turns on whether the additional conditions were satisfied to allow the officers to seize Zarnow's personal property without a warrant authorizing the seizure: (1) not only must the item be in plain view, but its incriminating character must also be "immediately apparent;" and (2) not only must the officer be lawfully located in the place from which the item can be seen, but he must also have a lawful right of access to the object itself. *See id.* at 136-37. Where evidence is in plain view, but the probative value of it remains uncertain, seizure of the evidence is unconstitutional. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971); Horton, 496 U.S. at 137; *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987). Probable cause is required for a search, for a cursory inspection that involves more than merely looking at the item, and for a seizure of personal property from a citizen's home. *See Hicks*, 480 U.S. at 327. Here, the policy of the City of Wichita Falls, as testified to by its Police Chief and other veteran officers, is facially unconstitutional. *See Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir. 2001).

In the trial court and on appeal, Zarnow has presented sworn deposition testimony of three key officers: policymaker, Police Chief Kenneth Coughlin, who was a veteran of the Wichita Falls Police Department for twenty-two years, Sergeant Roger Kendall, who was a veteran of the Wichita Falls Police Department for twenty-one years, and Officer Bobby Dilbeck, who was a veteran of the Wichita Falls Police Department for twenty-seven years. All three testified to an unconstitutionally broad policy of the Wichita Falls Police Department as to the warrantless seizure of personal property.

Policymaker Coughlin explained the plain view doctrine in general terms thus:

> Well, basically, if in the course or scope of an officer's duties they come across something that's sitting out in the open that would not – you know, would obviously, say, something of a contraband nature or of an evidentiary nature or something of a particular crime, that's generally accepted that you don't – you can look at it and seize it if it's something that's there in plain view. R. 2660.

When asked what the legal requirements that an officer must meet in order to properly seize a plain-view item, Coughlin stated that "[t]hey would have to legally be where they would – where they are for a legal reason. I mean, in other words, I couldn't . . . go somewhere that I would not have a legal reason or authority to be and then try to call that plain view. I would have to be there legally initially. And then if I see something, it would be considered plain view." When directly asked whether the reasoning for seizing

the item needed to be immediately apparent, Coughlin answered, "Not necessarily." R. 2661.

When questioned about the seizure of Zarnow's particular, specific property, policymaker Coughlin continued to answer in general terms. When asked what the justification for seizing Zarnow's currency was, Coughlin stated, "when you are conducting a criminal investigation, anything that may be evidence to support the initial charge, fruits of any additional crimes it may be attached to or subsequent to that will often be collected as evidence." R. 2839-40. Upon questioning regarding the seizure of a shotgun that Coughlin admitted was "in and of itself" not a prohibited weapon, Coughlin again stated, in general terms,

> "you often will seize a lot initially until you rule things in or out. Anything that could possibly be evidence is – during the execution of the warrant is – that's your opportunity at that point to collect whatever you believe to be evidence or potential evidence. It doesn't mean necessarily that every single piece will or will not be used at some point. It's just the opportunity to seize anything that could be connected to any kind of criminal activity." R. 2846-47.

When discussing the reasoning for seizing Zarnow's coin collections, Coughlin stated that it "would be along the lines of the currency, anything that could possibly be fruits of any crime." When asked for the reasoning for seizing Zarnow's medications, Coughlin stated, "when you're looking into that portion of the case, questions need to be asked and answered as to

whether perhaps these drugs were being sold, distributed illegally, any of those types of things." R. 2881-82.

Sergeant Kendall and Officer Dilbeck echoed their policymaker's testimony nearly exactly when defining the plain view doctrine in general and when describing the justification for seizing the aforementioned personal property from Dr. Zarnow. R. 2411, 3412. This policy of the City of Wichita Falls is unconstitutional because (1) where evidence is in plain view but the probative value of it remains uncertain, seizure of it is unconstitutional, *see, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971); *Horton v. California*, 496 U.S. 128, 137 (1990); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987); (2) for a search of a cursory inspection that involves more than merely looking at the item, and for a seizure of property from the home, probable cause is required, *Hicks*, 480 U.S. at 327; and (3) the reasoning for seizing property must be immediately apparent, *Horton*, 496 U.S. at 137; *Hicks*, 480 U.S. at 327.

3. The unconstitutional policy of the City of Wichita Falls was the moving force behind the deprivations of Zarnow's constitutional rights.

Zarnow must also prove, and did prove in the trial court, that the City of Wichita Falls's deliberate conduct was the "moving force" behind his injury. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). There must be an affirmative link between the municipal policy, procedure, or custom and the

particular constitutional violation alleged before liability will be imposed. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Having found no municipal policy, the Fifth Circuit Court of Appeals declined to consider this prong of the inquiry.

a. Dr. Zarnow's constitutional rights were violated.

As described *supra*, on July 13, 1999, Wichita Falls Police Officer Kyle Collier, at the direction of the City's policymaker, Chief Coughlin, sought and obtained a warrant to search Dr. Zarnow's home. Collier claimed that he believed Dr. Zarnow was "in possession of illegal explosives and other explosive devices in violation of Texas Penal Code Statute 46.05 Prohibited Weapons and Texas Penal Code Statute 46.09 Components of Explosives." The warrant authorized Collier to enter Zarnow's home and "to there search for the property and items described in said Affidavit and to seize the same and bring them before [the magistrate]." The property and items that were described in the affidavit were:

> "various types of explosives, assorted explosive triggering devices, and prohibited weapons, written records, books, notes and documents indicating the sales, purchases, and/or transactions of explosive devices. Any papers or documents indicating the transportation of and/or purchase of prohibited weapons. Written documents indicating possession of and/or dominion and control of the here and after described premises, such as utility buildings, receipts, mail, etc. Written documents indicating possession of or

> ownership of any other properties. Computers and any and all contents including all files. Any papers or documents indicating the lease of storage facilities of any type."

Zarnow complains of the seizure of his personal property that was not authorized in the warrant and did not fall within the parameters of the "plain view" doctrine, which might allow for the warrantless seizure of some of his personal property. First, officers seized currency from Dr. Zarnow. According to policymaker Coughlin, the justification for seizing the currency was that "when you are conducting a criminal investigation, anything that may be evidence to support the initial charge, fruits of any additional crimes it may be attached to or subsequent to that will often be collected as evidence." R. 2839-40 Further, "at the time this money was seized, we were early in the investigation; we didn't know yet. He could have been dealing in arms. He could have been selling drugs. He could have been doing a host of things. So it was all seized." *Id.* Clearly, this justification for seizing Zarnow's property from his home does not meet the probable cause requirements of *Hicks*, 480 U.S. at 326-27. The police department had no probable cause to believe that the currency seized from Zarnow was lawfully seized, and they did not seek a warrant for authorization to seize it. The seizure is unconstitutional.

Officers also seized numerous shotguns and rifles from Zarnow. According to policymaker Coughlin, the justification for seizing the shotguns was that "you need to check to be sure that they were indeed not altered or anything done to them . . . we wanted it to be checked to . . . rule out anything after the portion of

the case involving the prohibited weapon that would possibly fall into that or even the explosive portion of the case." R. 4347. Coughlin acknowledged that without modification, the shotgun would not be a prohibited weapon. Id. Therefore, unless officers had probable cause to believe that the shotgun was altered, the seizure of that item without a warrant covering shotguns is unconstitutional. *See Hicks*, 480 U.S. at 326-27. Further, policymaker Coughlin testified that there was another category of guns that officers seized because there "are military-related or have military types that would certainly probably be easily adaptable." It is not the privilege of law enforcement officials to seize first and ask questions later; the incriminating character of the property must be immediately apparent. *See id.*; *Horton v. California*, 496 U.S. 128 (1990). If this Court has outlawed the lifting of stereo equipment to record serial numbers to investigate possible stolen property; *Hicks*, 480 U.S. at 326-28, it would certainly disallow officers to seize and remove shotguns from Zarnow's home to investigate possible alterations that were not noticed or alleged and the rampant removal of any weapon that might be military-related or would "certainly probably be easily adaptable."

Wichita Falls police officers also seized parts of Zarnow's coin collections and gold and silver bars. Policymaker Coughlin explained that they "could be possibly fruits of any crime." R. 2839 This does not rise to the level of probable cause, and the seizure of Zarnow's coins, gold, and silver is unconstitutional. *See Hicks*, 480 U.S. at 326-28; *Horton v. California*, 496 U.S. 128 (1990).

Wichita Falls police officers removed vast quantities of medication, both prescription and over-the-counter from Dr. Zarnow's home. No medications were listed in the warrant. Policymaker Coughlin claims that "when you're looking into that portion of the case, questions need to be asked and answered as to whether perhaps these drugs were being sold, distributed illegally, any of those types of things. Even some of your non-prescription medications could have been used for unlawful purposes." R. 2881–82. Again, without probable cause, the seizure of these items is unconstitutional.

b. The Policy of the City of Wichita Falls was the moving force behind the constitutional violations.

Where the policymaker and other longtime veterans of the Wichita Falls Police Department outline city policy regarding the warrantless seizure of personal property, and that policy violates longstanding constitutional principles, it is clear that a policy exists. City policy dictated to the officers the procedures they must follow. Policymaker Coughlin and others provided definitions of City policy that mandated the officers seize "anything that could possibly be connected to any kind of criminal activity." R. 2846–47. The officers acted within their training and according to the direction of their superiors including policymaker Coughlin; therefore, City policy has then caused the violations of which Zarnow complains. City of Wichita Falls policy dictated that the officers seize first and ask questions later, and the officers, including policymaker Coughlin put that policy into effect in July 1999.

Where a police officer testifies that he thought he was acting pursuant to government policy or custom and there is no evidence that what was done by the officer was anything other than government policy or custom, and the government maintains that the officers' actions are proper, a plaintiff need not produce further evidence of policy or custom to establish *Monell* liability. *See, e.g., Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir. 1987); *Oklahoma City v. Tuttle*, 471 U.S. 808, 819-20 (1985).

When a government decision-maker such as policymaker Coughlin, has the final authority to establish government policy with respect to the action ordered or omitted, and a deliberate choice to follow a course of action is made from among various alternatives (such as seizing the items without seeking another warrant to permit the seizure), governmental liability can be found based on even a single incident of allegedly wrongful activity. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The policymaker Coughlin decided to seize items that were not listed in the warrant but under the flawed plain view doctrine that he and the other Wichita Falls Police Officers espoused. If the City had enacted a policy regarding warrantless seizures that comported with the Fourth Amendment, much of Zarnow's property would not have been seized in the manner it was.

Members of the Wichita Falls Police Department sought and obtained a warrant to search and seize certain of Zarnow's property. More than thirty-five (35) members of the Wichita Falls Police Department lead by policymaker Coughlin, ransacked Zarnow's home and removed almost everything in it other than clothes and some food. Most of the items that were

seized were not listed in any warrant. But for the City of Wichita Falls's unconstitutional policy regarding warrantless seizures of property in "plain view," the items would not have been seized without a warrant.

B. The Fifth Circuit's approach violates this Court's decisions and creates a nonsensical bar to legitimate claims.

The Fifth Circuit Court of Appeals denied Zarnow relief because it claims that Zarnow failed to show a pattern of unconstitutional conduct by Wichita Falls police officers. *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168-72 (5th Cir. 2010). The court acknowledged that the constitutional violation that Zarnow alleges "arose from a peculiar interpretation of a 'plain view' procedure." *Id.* at 168. The court stated that a "pattern of conduct is necessary only where the municipal actors are not policymakers." *Id.* at 169. The court stated that Zarnow failed to present testimony that the plain view doctrine was misused in another case and that "mere 'improbable inferences' and 'unsupported speculation' are not proper summary judgment evidence." *Id.* (citation omitted). Therefore, though the court deemed Coughlin a policymaker and though the court determined that his view of the plain-view doctrine is "errant," the court declined to impose liability on the City of Wichita Falls or to allow the case to proceed to trial.

This reasoning violates common sense and the holdings of this Court and the Fifth Circuit itself. First, it is true that in many cases, a pattern mist be proved in order to show the official policy of the municipality. However, here, Zarnow showed more than most plaintiffs can – (1) that Coughlin is a

policymaker, and (2) that Coughlin and his subordinates shared the same understanding of the City's unconstitutionally broad policy regarding the seizure of personal property outside a warrant and without probable cause. Once the existence of that policy is shown through the direct testimony of more than one officer, including the policymaker himself, the existence of a policy does not need to be proved indirectly through inferences based on prior conduct and whether those inferences reflect a pattern. At a minimum, there is a fact question as to those inferences and their reasonableness; therefore, the City of Wichita Falls is not entitled to summary judgment.

Second, Coughlin and Dilbeck both testify in general terms regarding the reasons for seizing shotguns, money, medications, and so forth. Policymaker Coughlin says that:

- "You often will seize a lot initially until you rule things in or out."
- The reasoning for seizing an item does "not necessarily" have to be immediately apparent.
- "Questions need to be asked and answered," so items were seized.
- "When you are conducting a criminal investigation, anything that may be evidence to support the initial charge, fruits of any additional crimes it may be attached to or subsequent to that will often be collected as evidence."

It is certainly not "improbable" or "unsupported speculation to assert that the actions have occurred for so long as with such frequency that the course of conduct in this case demonstrates the municipality's knowledge and acceptance of the disputed conduct. Policymaker Coughlin himself, when asked specific questions about the facts in this specific case, chose to answer in general terms and speak about what "often" happens.

Third, the policy itself is facially unconstitutional. Therefore, specific prior instances where the policy actually violated someone else's rights are not required. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir. 2001). Where an official policy is itself unconstitutional or directs employees to take unconstitutional action, no evidence beyond a statement of the policy and its exercise is necessary to establish § 1983 liability. *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 389 (8th Cir. 2007) (en banc).

Finally, where the officers themselves testify as to "routine," summary judgment is improper. *In re Foust v. McNeill*, 310 F.3d 849, 862 (5th Cir. 2002) ("Thigpen and McNeill testified that the sheriff's office *routinely* seized a debtor's entire premises to secure personal property and fixtures. Neither the bankruptcy court nor the district court mentioned this testimony, and the defendants do not address it. If the department repeatedly went beyond the scope of the writs to seize real property, its policy may have violated the Fourth and Fourteenth Amendments. The department was deliberately indifferent to those results, *i.e.*, the seizure of the real property and exceeding the scope of the writ, even if unaware of the unlawfulness of the

actions. The Fousts have created a fact question about whether the department's policy of seizing the premises violated the Fourth and Fourteenth Amendments, so this portion of the district court opinion is reversed.").

C. This is an important federal question.

Because the Fifth Circuit Court of Appeals has failed to apply the applicable law and reasonable inferences to the facts at hand, this Court should exercise its jurisdiction to rectify plainly erroneous holdings of the lower courts. Where the Fifth Circuit has recognized that Coughlin is the policymaker and that Coughlin and others testified as to an unconstitutional policy or practice but still requires proof of harm to additional individuals, the Fifth Circuit is illogically causing extreme harm to those who are grievously harmed, simply because they have not had the misfortune to have been victimized before.

D. At the very least, this Court should hold this petition pending the decision in Connick, which raises a similar question regarding the "pattern" requirement.

A similar question was recently argued in this Court in *Connick v. Thompson*, No. 09-571, *cert. granted*, Mar. 22, 2010. Therefore, though the underlying facts are different, the principles and applications of those principles are substantially similar; therefore, the Court should hold this petition pending decision in *Connick*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 10, 2011

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-10313

[Filed August 9, 2010]

DELORES A ZARNOW,
Independent Administratrix for the
Estate of Dr Allen J Zarnow, Deceased,

Plaintiff - Appellant Cross-Appellee

v.

CITY OF WICHITA FALLS TEXAS;
KEN COUGHLIN,

Defendants - Appellees Cross-Appellants

Appeals from the United States District Court
for the Northern District of Texas

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

Leslie H. Southwick, Circuit Judge.

This is a suit under Section 1983. The claim is that a city and its police chief violated a person's Fourth Amendment rights. The district court granted summary judgment in favor of the defendants. We AFFIRM.

I. STATEMENT OF FACTS

Dr. Allen Zarnow was a physician at the Clinics of North Texas ("the Clinic") in Wichita Falls, Texas. In July 1999, while Zarnow was on vacation, Clinic employees discovered a gun, an ammunition magazine, several boxes of shells, blasting caps, ammunition, and fuses in his office. None of the items were active explosive devices. The Clinic's manager contacted the police.

Employees at the Clinic reportedly told the first officer on the scene that Zarnow was a "gun expert and salesman." Based on his military experience, the police officer concluded that the found items were "dangerous." Firefighters, however, thought the materials did not constitute an imminent hazard. The responding officer contacted the Bureau of Alcohol, Tobacco, and Firearms ("ATF") and also telephoned his superiors. Police Chief Ken Coughlin arrived at the Clinic sometime after the initial discovery. Although keeping apprised of the situation, he apparently did not assume command of the scene.

Shortly thereafter, police applied for a warrant to search Zarnow's home. The affidavit on which the warrant application was based stated that the offense believed to have been committed was "possession of illegal explosives and other explosive devices" in violation of Texas Penal Code Sections 46.05 and

46.09. Among the allegations asserted in the affidavit were that "explosives" and "explosive devices" had been identified at Zarnow's office by "an expert on bombs and explosives." A local magistrate signed the warrant, which permitted officers to search for explosive devices and prohibited weapons, along with any documents or notes pertaining to the ownership of the weapons or the house.

While waiting for the magistrate to sign the warrant, police surrounded Zarnow's home for surveillance. Upon discovering that Zarnow and his family had returned from vacation, police ordered Zarnow to exit the house. Zarnow acquiesced. During a subsequent interrogation, Zarnow assured police officers that he was a properly licensed firearms dealer, and offered to produce paperwork showing his entitlement to possess all of the materials recovered at his office. Police asked to see the documents, and Zarnow informed them that the paperwork was in the house.

Zarnow was accompanied by police officers and ATF agents into the residence, where he presented papers proving that he was licensed to possess weapons and explosive materials. As Zarnow showed the documents to the ATF agent, the police officers began a consensual search of the home. When they discovered a box marked "explosives" in plain view, Zarnow withdrew his consent and asked the officers to leave. Officers informed Zarnow that his consent was no longer necessary since they had a warrant to search the home.

The next morning, Chief Coughlin assembled all of the firearms and ammunition seized at Zarnow's home

and laid them out for the news media to photograph. Zarnow was jailed for possession of prohibited weapons. Over the next few days, the police executed an additional search warrant at Zarnow's home and yet another at his lake house. However, a Wichita Falls grand jury refused to indict, and no charges were ever brought against him.

During the searches of Zarnow's homes, police officers seized weapons, ammunition, currency, bonds, silver, band-aids, books, prescription medicines, and over-the-counter medications. Although a number of these items were not covered by the search warrant, police justified their seizure by citing to the "plain view" doctrine. Officers later testified that they understood "plain view" to permit the collection of any item that might be evidence of any crime. The police chief testified that it was his practice to seize more than was necessary during an initial search, so that he could later "rule things in or out."

Zarnow filed suit in the U.S. District Court for the Northern District of Texas, naming as defendants the City of Wichita Falls, Chief Coughlin, eight named subordinate officers, and eight unnamed officers all in their individual and official capacities. Zarnow alleged violations of the Second, Fourth, Fifth, Sixth, and Fourteenth Amendments, and sought relief under 42 U.S.C. § 1983. During the litigation, Allen Zarnow died. His widow, as administratrix of his estate, was substituted as plaintiff.

Several officers were dismissed from the suit. All official capacity claims were dismissed except for those against Chief Coughlin. The remaining defendants

later moved for summary judgment on qualified immunity grounds.

The summary judgment motion was granted as to Zarnow's claims under the Second, Fifth, Sixth, and Fourteenth Amendments. However, summary judgment was denied as to the Fourth Amendment claims. The City and the individual officers appealed.

On appeal, a panel of this Court determined that it was without jurisdiction to hear the City's appeal because the denial of summary judgment was not a final order. *Zarnow v. City of Wichita Falls, Tex.*, 500 F.3d 401 (5th Cir. 2007). As to the claims against the individual officers, some of their conduct likely violated Zarnow's Fourth Amendment rights. Nevertheless, the panel held that the officers were entitled to qualified immunity and dismissed the claims against them. Only Zarnow's claims against the City and Chief Coughlin in his official capacity remained. The case was remanded to the district court for further proceedings.

On remand, Zarnow alleged that the City was responsible for the officers' misuse of the plain view doctrine during the home searches. Zarnow argued that the officers' expansive view of the doctrine was inconsistent with a Supreme Court decision that "plain view" seizures had to be supported by probable cause. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). Zarnow contended that the officers' improper use of the "plain view" doctrine constituted a "policy or custom" of the City that was implemented by its policymaker, Chief Coughlin.

Both parties again moved for summary judgment, which was granted in favor of the City. The court found that Chief Coughlin was a "potential policymaker," but that the officers' use of the plain view doctrine was not a "custom or policy" of the City. Consequently, the court did not reach whether a policy was the "moving force" behind the alleged constitutional violation.

Zarnow timely appealed the district court's grant of summary judgment in favor of the City. The City cross-appealed to challenge the court's finding that Chief Coughlin was a "potential policymaker."

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*. *Mahaffey v. Gen. Sec. Ins. Co.*, 543 F.3d 738, 740 (5th Cir. 2008). A district court should grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). In making this determination, the evidence must be viewed in the light most favorable to the nonmoving party. *Mahaffey*, 543 F.3d at 740.

A. Municipal Liability

A municipality is a "person" subject to suit under Section 1983. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). A local government entity may be sued "if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting

Monell, 436 U.S. at 690). Alternatively, municipal liability may attach where the constitutional deprivation is pursuant to a governmental custom, even if such custom has not received formal approval. *Monell*, 436 U.S. at 690-91. "[M]unicipal liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citation omitted).

The elements of the *Monell* test exist to prevent a collapse of the municipal liability inquiry into a *respondeat superior* analysis. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 415 (1997). A municipality may not be subject to liability merely for employing a tortfeasor. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989). Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation. *Id.* at 391-92.

1. Municipal Liability – Policymaker

The first requirement for imposing municipal liability is proof that an official policymaker with actual or constructive knowledge of the constitutional violation acted on behalf of the municipality. *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 748-49 (5th Cir. 2005). A policymaker is "one who takes the place of the governing body in a designated area of city administration." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). He or she must "decide the goals for a particular city function and devise the means of achieving those goals." *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en

banc). Zarnow insists that Chief Coughlin acted as the City's policymaker and was actively aware of the errant plain view policy used in the seizure of items from her home.

A city's governing body may delegate policymaking authority (1) by express statement or formal action or (2) "it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role." *Id.* There is no express delegation here.

As evidence of the City's conduct or practice, Zarnow produced several "General Orders" issued by the chief of police to the police department.[1] Each General Order begins with the language, "It is the policy of this department . . ." and proceeds to set out regulations addressing specific behaviors. These orders are binding on the officers until reviewed, altered, or changed by the City Manager or City Council. Zarnow asserts that the chief's general power to issue such orders establishes a custom by which the chief creates law enforcement policy for the City. *See Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 616 (5th Cir. 1999).

The City, on the other hand, contends that Chief Coughlin was a "decisionmaker" but not an official policymaker for the City. There is a fine distinction between a policymaker and a decisionmaker. *Jett v. Dall. Indep. Sch. Dist.*, 7 F.3d 1241, 1247 (5th Cir. 1993). The fact that an official's decisions are final is

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[1] There is no argument that the police chief promulgated a General Order specifically addressing the "plain view" policy of which Zarnow complains. He did not.

insufficient to demonstrate policymaker status. *Id.* at 1248.

The City employs state law as evidence that Coughlin is not a policymaker. Wichita Falls is a "home rule city" according to Texas Law. Its powers are limited only by the Texas Constitution, state statutes, and the City's Charter. Tex. Loc. Gov. Code § 51.072 (Vernon 2001). In Wichita Falls, the City Council and City Manager hold general legislative and executive powers. The City insists that the City Manager and City Council have the relevant authority over the police department as established by Article 12 of the City Charter:

> The police department shall be under the direction of a chief of police, who shall be appointed by the city manager and who, subject to the supervision of the city manager and to such rules regulations and orders prescribed by the city manager not inconsistent with the City Charter and ordinances, shall have immediate control and direction of such department . . . .

This is the kind of authority, the City argues, that equates to policymaking authority in the specific department where the constitutional deprivation occurred. *McMillan v. Monroe Cnty., Ala.*, 520 U.S. 781, 786-87 (1997).

Relying on Article 12, the City insists that the City Manager has supervisory authority over the police chief. This type of review of the police chief's actions demonstrates, the City argues, that he is not a final policymaker. *See Colle v. Brazos Cnty., Tex.*, 981 F.2d 237, 244-45 (5th Cir. 1993).

The nature of the administrative oversight is important in determining "policymaker" status. An official may be a policymaker even if a separate governing body retains some powers. *See Bennett*, 728 F.2d at 769. An official may be termed a "policymaker" even if the municipality retains "the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official." *Id.* Further, the subject matter of administrative review must be precise in order to attach the presumption against policymaking. *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 603 (5th Cir. 2001). "The mere existence of oversight, however, is not enough; the oversight must pertain to the area of authority in question." *Id.* (citation omitted).

Although the City offered evidence that the City Council periodically authorized the creation of various police task forces, those resolutions have little to do with police policy. There is no evidence that the City Council has ever commented authoritatively on the internal procedures of the department. Consequently, the administrative review process in place here does not conclusively demonstrate that Chief Coughlin is not a policymaker.

Still, we have maintained that "neither complete discretionary authority nor the unreviewability of such authority automatically results in municipal liability. There must be more." *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 551 (5th Cir. 2008). We agree with the district court that the General Orders promulgated by the police chief sufficed to be the "more" that is needed to prove policymaking authority in these circumstances. On this evidence, the chief of police is the sole official responsible for internal police policy.

Others have only marginal involvement with the internal procedures of the police force. The alleged constitutional violation arose from a peculiar interpretation of a "plain view" procedure, which was employed only during police activities.

Although no General Order was ever entered regarding this policy, it appears that the police chief would have been authorized to speak on the City's behalf if such a policy was created. Accordingly, we hold that the City impliedly delegated its policymaking authority to the chief of police.

2. Municipal Liability – Official Policy or Custom

Upon finding a policymaker, we must next consider whether the allegedly unconstitutional action constitutes a "custom or policy" of the municipality. We have identified two forms that "official policy" may take. First, a plaintiff may point to a policy statement formally announced by an official policymaker. *See Webster*, 735 F.2d at 841. In the alternative, the plaintiff may demonstrate a "persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Id.* Because no formal directive exists concerning the police department's "plain view" practices, our analysis turns on the second form of policy.

A plaintiff may prove the existence of a "custom or policy" in one of two ways. First, a pattern of unconstitutional conduct may be shown on the part of municipal actors or employees. *Id.* at 842. A pattern of conduct is necessary only where the municipal actors

are *not* policymakers. Alternatively, it may be shown that a *final policymaker* took a single unconstitutional action. *Bolton*, 541 F.3d at 548.

a. Pattern of Unconstitutional Conduct

The district court concluded that Zarnow has not demonstrated a pattern of unconstitutional conduct by police officers. A customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct. *Webster*, 735 F.2d at 842.

In an effort to establish a pattern, Zarnow invites this Court to rely on a series of inferences. The officers' testimony concerning the plain view doctrine was given several years after the incident giving rise to this action. During the intervening period, Zarnow alleges many unconstitutional searches of the same type must have taken place. No evidence of that was offered. There is no testimony that the plain view doctrine was misused in another case. Mere "improbable inferences" and "unsupported speculation" are not proper summary judgment evidence. *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

Zarnow asserts that the Chief Coughlin and the City effectively ratified the officers' unconstitutional conduct. Among the arguments is that during this litigation, the City has defended the constitutionality and propriety of the actions taken by its officers, despite the finding of a prior panel of this Court that the officers' actions violated the Fourth Amendment. Such a defense constitutes, so the argument goes, a ratification of the unlawful conduct of its officers.

Good faith statements made in defending complaints against municipal employees do not demonstrate ratification. *See Peterson v. City of Forth Worth, Tex.*, 588 F.3d 833, 852 (5th Cir. 2009). A "policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality." *Id.* at 848 (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1161-62 (5th Cir. 1986)).

Zarnow also suggests that Chief Coughlin may have incurred liability on behalf of the City by failing to supervise his subordinates during the search. To support a supervisory liability claim, the misconduct of a subordinate must be conclusively linked to the action or inaction of the supervisor. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994) (en banc). A supervisory official is liable if he demonstrates deliberate indifference to a plaintiff's constitutionally protected rights. *Id.* at 454.

Deliberate indifference is "more blameworthy than negligence" but less blameworthy than purposeful harm. *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994). The standard is "stringent" and requires that the supervisory actor disregarded a known consequence of his action. *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 551 (5th Cir. 1997).

Here, there was no deliberate indifference. Coughlin shared the errant view of the doctrine which caused Zarnow's constitutional deprivation. Negligent misinformation is insufficient to establish supervisory liability. *See id.* Similarly, there is no evidence that Coughlin's failure to supervise the search rose above the level of negligent inaction. "Unintentionally negligent oversight" does not satisfy the deliberate

indifference standard. *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 756 (5th Cir. 1993)(citation omitted).

b. Single Instance of Unconstitutional Conduct by a Policymaker

The court did not consider whether Chief Coughlin committed a single constitutional violation sufficient to confer liability on the City. This was because Zarnow did not allege in the district court that Chief Coughlin personally committed such a violation. Instead, the focus was on theories of ratification and supervisory liability.

For the first time on appeal, Zarnow argues that a single incident of unconstitutional conduct by a policymaker may impute liability to the City. The only citation to this rule in her appellate briefing appears in the argument that Chief Coughlin failed to supervise his employees. The brief does not assert that Coughlin was personally involved with the violation itself. Under questioning at oral argument, Counsel nevertheless extended this argument, claiming for the first time that Coughlin personally seized prohibited items from the house.

This argument was not made to the district court. We will not consider it, as it is made for the first time on appeal and is therefore waived. *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

c. Failure to Train

As a separate theory of municipal liability, Zarnow contends that the City had a policy of inadequate training of its police officers. "A municipality's failure to train its police officers can without question give rise to § 1983 liability." *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 756 (5th Cir. 2009) (citations omitted). To prevail on a "failure to train theory" a plaintiff must demonstrate: (1) that the municipality's training procedures were inadequate, (2) that the municipality was deliberately indifferent in adopting its training policy, and (3) that the inadequate training policy directly caused the violations in question. *Id.*

Zarnow's initial brief does not reference any evidence concerning the procedures used to train the officers, the officers' qualifications, or direct references to the particular inadequacies of their Fourth Amendment training. Zarnow's only evidence that the training procedures were deficient is that the officers expressed an unlawful interpretation of the plain view doctrine. In order for "liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).

Further, this Court has previously rejected attempts by plaintiffs to present evidence of isolated violations and ascribe those violations to a failure to train. *See generally Goodman v. Harris Cnty.*, 571 F.3d 388 (5th Cir. 2009). Here, the only training-related evidence in the record demonstrated that the City's training procedures complied with state law. We

consider compliance with state requirements as a factor counseling against a "failure to train" finding. *See Conner v. Travis Cnty.*, 209 F.3d 794, 798 (5th Cir. 2000). Zarnow has not established that the City's training practices are inadequate. Because Zarnow cannot establish the first element of the "failure to train" test, we will not address the remaining ones.

3. Municipal Liability – Moving Force

The district court did not reach the final element of the municipal liability analysis, which considers whether the allegedly unlawful seizure policy was the "moving force"causing Zarnow's constitutional deprivations. *See Piotrowski*, 237 F.3d at 578. We stop short in our analysis as well. Because we are affirming the court's finding that Zarnow has not established a "custom or policy" of the City, we too need not consider the moving force factor.

B. Law-of-the-Case Doctrine

Zarnow argues that the law-of-the-case doctrine should have prevented the district court from granting summary judgment. That argument is based on the fact that the district court denied the City's first motion for summary judgment on the basis that issues of fact existed concerning whether the City's search policy was the "moving force" underlying the unlawful seizures conducted at Zarnow's home. Following an appeal to this Court on issues of qualified immunity, the case was remanded. The parties again moved for summary judgment. This time, the district court granted the City's motion.

Zarnow contends that the district court could not properly grant summary judgment to the City on the same issues decided in the prior order. However, the law-of-the-case doctrine does not operate to prevent a district court from reconsidering prior rulings. "A court has the power to revisit prior decisions of its own . . . in any circumstance. . . ." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). The doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citations omitted). The law-of-the-case doctrine is a rule of convenience designed to prevent unnecessary reconsideration of previously decided issues. *See Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983). It is equally clear, though, that the rule "yields to adequate reason." *Id.*

Further, we have rejected the argument that the doctrine precludes a grant of summary judgment following a prior denial. An order denying summary judgment is interlocutory, and leaves the trial court free to "reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994).

Accordingly, we agree with the district court that Chief Coughlin is a policymaker for the City, but that Zarnow has not established a custom or policy sufficient to impose liability. We AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10313

D.C. Docket No. 7:01-CV-128

DELORES A ZARNOW, Independent Administratrix for the Estate of Dr Allen J Zarnow, Deceased,

Plaintiff - Appellant Cross-Appellee

v.

CITY OF WICHITA FALLS TEXAS; CHIEF OF POLICE KEN COUGHLIN,

Defendants - Appellees Cross-Appellants

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

No. 7:01-CV-128-KA
ECF / Referred to the US Magistrate Judge

[Filed February 25, 2009]

DR. ALLEN J. ZARNOW	)
	)
V.	)
	)
CITY OF WICHITA FALLS, ET AL.	)
	)

Memorandum and Order on Motions for Summary Judgment

Before the Court are Plaintiff's Motion for Partial Summary Judgment (Docket No. 169) and Defendants' Motion for Summary Judgment (Docket Nos. 171). Extensive responses and replies with extensive appendices have been submitted by the parties. The parties have consented to trial before the Magistrate Judge. (Docket No. 38).

This is a civil rights case originally brought under title 18 U. S. Code §1983 by Dr. Allen Zarnow, now deceased, for compensatory and punitive damages for an unreasonable search and of his house and office by

police officers of the City of Wichita Falls and their unreasonable seizure of items of his personal property during the search. Dr. Zarnow sued a number of the officers who obtained warrants for the search of his house and his office, the Chief of Police and the City itself. The City, the Chief of Police and the individual officers appealed this court's denial of qualified immunity. During the pendency of this case, Dr. Zarnow died. Following his death during the pendency of this case, his wife, Delores A. Zarnow, as the executor of his estate, was substituted as the Plaintiff.

On an intermediate appeal, the Court of Appeals determined that the search conducted at Dr. Zarnow's house was unconstitutional due to the lack of probable cause for the issuance of the warrant, but that the individual officers who conducted the search had qualified immunity. The Court of Appeals dismissed the appeal by the City and the Chief of Police for want of jurisdiction. Following issuance of the 5th Circuit's mandate, this court entered an order (Docket No. 163) dismissing Police Chief Kenneth Coughlin as an *individual* party defendant, leaving the City and Coughlin in his *official capacity* as the only remaining defendants.

The factual background of the search and seizure events that gave rise to this suit is set forth at length in the 5th Circuit's decision [1]on the appeal of the qualified immunity issues in this case and will not be repeated here.

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[1] *City of Wichita Falls et al v. Zarnow*, 500 F.3d 401 (5th Circuit 2006).

Since the time of the Original Complaint and following the intermediate appeal, Plaintiff's claims have been scaled down dramatically. At the inception, Plaintiff sought personal injury damages as well as pecuniary compensation for the embarrassment and effrontery and loss of employment Dr. Zarnow sustained as a result of the illegal searches of his office, home and lake house by swarms of law enforcement officers and the seizure and public display of his legally purchased and stored firearms, ammunition and personal property items and the eventual loss and destruction of some of these items. Now, it is only the pecuniary value of the loss of the ammunition and the value of the few items of Zarnow's personal property that were not returned by the City that supports his property damage claims, but the personal injury claims are still within the scope of the pleadings. This scale down has occurred in part as a result of the dismissal of claims against the individual officers on qualified immunity grounds leaving punitive damages unrecoverable against the City and/or the Chief of Police, the sole remaining defendants and in part because the seized firearms were previously returned to Zarnow and the seized ammunition was destroyed pursuant to an agreement reached between Zarnow and the office of the District Attorney of Wichita County, Texas. The decision of the Court of Appeals further precluded a finding that the seizure of the firearms, explosives and components at Zarnow's Office was unreasonable since seizure of those items were expressly directed in the Zarnow search warrants.[2] All that is left of the subject matter

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[2] The warrant seizure scope read as follows: "VARIOUS TYPE OF EXPLOSIVES, ASSORTED EXPLOSIVE TRIGGERING

of Plaintiff's damage claims is the seizure of the currency, prescription drugs, gold and silver bars, and guns at his home.

In summary, by her Motion for Partial Summary Judgment, Plaintiff asserts that at the time of the Zarnow search, as to search and seizure matters within his purview, Chief Coughlin was a *final policy maker*. As such *final policy maker* he had established a binding, unreviewed, unwritten *policy* arising from a *custom* of allowing police officers during a search to seize indiscriminately any items of personal property in "plain view" that *might* be evidence of or fruits of *some* crime. Plaintiff says that the *policy* allowed officers to seize the items whether or not the officer seizing the property could then or later identify or articulate the crime as to which the seized items were evidence or fruits. Further, since the search warrant for Zarnow's home was not valid due to the absence of probable cause, the search made after consent was withdrawn by Zarnow was a violation of Zarnow's

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DEVICES, ANY PROHIBITED WEAPONS, WRITTEN RECORDS, BOOKS, NOTES AND DOCUMENTS INDICATING THE SALES PURCHASES AND/OR TRANSACTIONS OF EXPLOSIVE DEVICES. ANY PAPERS OR DOCUMENTS INDICATING THE TRANSPORTARTION [sic]OF AND/OR PURCHASE OF PROHIBITED WEAPONS. WRITTEN DOCUMENTS INDICATING POSSESSION OF AND/OR DOMINION AND CONTROL OF THE HERE AND AFTER DESCRIBED PREMISES, SUCH AS UTILITY BUILDINGS, RECEIPTS, MAIL ETC. WRITTEN DOCUMENTS INDICATING POSSESSION OF OR OWNERSHIP OF ANY OTHER PROPERTIES, COMPUTERS AND ANY AND ALL CONTENTS INCLUDING ALL FILES. ANY PAPERS OR DOCUMENTS INDICATING THE LEASE OF STORAGE FACILITIES OF ANY TYPE."

Constitutional rights.[3] And further the seizure of items not even mentioned within the four corners of the warrant itself (currency, prescription drugs, and silver) was unreasonable and caused the damages to Zarnow. Plaintiff asserts that it was the unreasonable, illegal expansion of the "plain view" doctrine of the Chief's *policy* that was the moving force behind the seizure of the unmentioned items and their eventual loss resulting in Plaintiff's pecuniary and personal injury damages. Finally, even if Coughlin was not a "final policy maker", there was a *custom* among the members of the Department to indiscriminately seize property ostensibly "in plain view" but without being related to the crime or crimes being investigated for which the items were seized. "And", says the Plaintiff, "the City knew about the *custom* and was consciously indifferent to it.

In summary, the City asserts that under state and local law, Chief Coughlin was not a policy maker, much less a *final* policy maker. Only the City Council and through it the City Manager were permitted under Texas state law and the City's own charter to make policy binding on the City; that the City had adopted as its search and seizure policy the standards set out in Article 18.01 of the Texas Code of Criminal Procedure which was in effect at the time of the Zarnow search (state law) ; that the City Council had never expressly delegated to the Chief of Police the authority to nor did he establish any formal or by custom any informal search and seizure *policy*, much less a "plain view" policy, much less an unreasonably

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[3] So found by the District Court and the Court of Appeals, *Zarnow* case, supra p. 409.

broad "plain view" policy; that the items seized during the Zarnow search were in "plain view" and the officers seizing the items reasonably thought at the time that the items were evidence or fruits of a crime or crimes. Hence, says the City, the seizure of the items was not unreasonable and hence, not a constitutional violation and, besides, and besides the City was unaware of the expansive "plain view" *custom*, if it existed, and was not consciously indifferent to it. Finally, under *Monell*[4] and its progeny, something more than negligence was required for the City to be liable to Zarnow for the loss or non-return of the seized items. And Zarnow has no evidence to show any personal injury damages and the loss of the other items was *de minimus* at best.

With respect to municipal liability for constitutional violations by its employees, Judge Kinkeade observed in a recent §1983 case[5] the following:

> "Although municipal liability exists under 42 U.S.C. § 1983, there is no *respondeat superior* liability for a constitutional deprivation by its employees. *Bd. Of County Commr's of Bryan County, OK v. Brown*, 503 U. S. 397, 403 (1997); *Pineda v. City of Houston*, 291 F. 3d 325, 328 (5th Cir. 2002); citing *Madrid v. Anthony*, ___F. Supp.2d ___, 2007 WL 2782360 *4 n.16 (S.D..Tex. 2007) (municipality cannot be held liable under section 1983 because it employs a

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[5] *Reed v. City of Garland*, Civil Action No 3:04-CV-239-K (N.D. Tex. 2007)

tortfeasor under a *respondeat superior* theory). Rather, the city's liability under section 1983 depends on proof of three elements: a policymaker, an official policy, and a violation of the plaintiff's constitutional rights whose "moving force" is the policy or custom. *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (55th Cir.), cert. Denied, 534 U.S. 820, 122 S.Ct. 53, 151 L.Ed 2d 23 (2001)."

. . .

"Municipal policy for the purposes of section 1983 liability may be found in a policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. *Johnson v. Deep East Texas Regional Narcotics Trafficking Task force*, 379 F.3d 293, 309 (5th Cir. 2004), citing *Johnson v. Moore*, 958 F.2d 92,94 (5th Cir. 1992). Alternatively, municipal policy under section 1983 can be a persistent, widespread practice of municipal officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *Id.* Actual or constructive knowledge of such a custom must be attributed to the governing body or the municipality or to an official to whom that body had delegated policy-making authority." Pp.2-3.

With respect to determining who within a municipality has "final policy making authority" the

Supreme Court has directed the courts to look to state and local law[6] but has evinced no preference for any single body as the source of municipal policymaking. The Supreme Court has instead remarked that "one may expect to find a rich variety of ways in which the power of local government is distributed among a host of different officials and official bodies. *Gros v. City of Grand Prairie*, 181 F.3d 613, 615 (5th Cir. 1999). The identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge. "Reviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage'" having the force of law" *St. Louis v. Praprotnik*, 485 U. S. 112, 108 S. Ct. 915, 99 L. Ed.2d 107 (1988).

To convince the court that Chief Coughlin was not a final policy maker the Defendants present to the court that the City of Wichita Falls is a home rule city which derives its powers from the Texas Constitution and whose broad powers are limited only by the City Charter, the Texas Constitution or by State statute, citing section 5 of Article 11 of the Texas Constitution and Section 51.072 of the Texas Local Government Code. Further, the City Charter [7] expressly provides that "the city council shall set policy for the City by the enactment of ordinances, the passage of resolutions, the adoption of a budget and the passage of such other rules as necessary to establish city policy under the

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[6] *Jett v. Dallas Ind. School District*, 109 S.Ct. 2702, 491 U.S. 701, 105 L.Ed. 2d 598 (1989).

[7] App. pp. 1-105, Docket No. 171

laws and Constitution of the State of Texas."[8] The City Charter further provides that the City Manager is delegated the authority to prescribe operational rules and regulations to effectuate that policy[9] and reserves to the City Manager the right to supervise the Department Heads[10] such as the Chief of Police established by Ordinance 998 in 1927.[11] Elsewhere in the Charter, as amplified by subsequent ordinances, the City Manager had the power to appoint and to hire and fire the Chief of Police. The general authority of the Chief of Police was proscribed and constrained as follows:

> "The Police Department shall be under the direction of a Chief of Police, who shall be appointed by the City Manager and who, subject to the supervision of the City Manager and to such rules, regulations and orders prescribed by the City Manager not inconsistent with the charter and ordinances of the City, shall have immediate control and direction of such Department. He shall be vested with the disciplinary power of the Department. Such Department shall be composed of the Chief of Police, a night captain, sergeant, detectives,

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[8] App. p.81, Docket No.171

[9] App. p. 29, Docket No. 171

[10] App. p. 105, Docket No. 171

[11] App. pp.151, Docket No. 171

patrolmen, and other officers and employees as the City Manager may determine."[12]

On paper, there is no express delegation of authority to the Chief of Police to promulgate policy, much less any *final* policy. But the Plaintiff notes that the Charter and Ordinances of the City do not expressly negate the authority of the Chief of Police to create and/or promulgate policy for his Department with respect to matters of Department concern, so long as those policies do not conflict with policies of the City Manager or the City Council.

Where the State and local positive law does not expressly answer where and under what circumstances the Chief of Police may make final policy, we must look at actual practice within the Department and the City. Plaintiff is unable to point to any *express* delegation of authority to Chief Coughlin to create any policies binding on the City but instead relies on an alleged *custom and usage* established under Coughlin's predecessor in office. The former Chief promulgated at least two "General Orders" relating to aspects of law enforcement within the Department that remained unchanged by the City Manager or the City Council and still remained in force or effect at the time of the Zarnow searches. The first of these General Orders (Exhibit 3, Docket No.169) was numbered 200.003, dated March 27, 1987 with an effective date of September 15, 1987, titled *Preliminary and Followup Investigations by Patrol Officers, Command of the Crime Scene, Media*

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[12] App. pp.151-52, Docket No. 171

Relations at a Crime Scene. In the first Section of the General Order it is stated:

> "A. It is the policy of this department for Patrol Section Officers to respond to all complaint calls and conduct preliminary investigations...." (emphasis provided).

Throughout this General Order the provisions used the imperative words "shall" or "will" as directives toward the officers conduct in the various aspects of law enforcement investigation activities referenced therein. The General Order bears the signature of the then acting Chief of Police.

The second of these General Orders (Exhibit 2, Docket No. 169) was numbered 100.035, dated March 15, 1987 with an effective date of June 1, 1987, titled *Property, Reception and Storage of Property, Disposition of Department-Owned Property, Narcotics and Dangerous Drugs, Reception and Storage, and Disposition of.* In the First section of this General Order it is stated:

> "A. It is the policy of this Department that all items of an evidentiary nature, found or recovered property, contraband, and department stores be entered into the property room..." (emphasis provided)

And, as with the previously mentioned General Order, this one too used the imperative words "shall" and "will" throughout its provisions. This General Order also bears the signature of the then acting Chief of Police.

I find that these General Orders clearly established "policy" within the Department binding upon the officers within the Department with respect to the discharge and manner of discharge of certain of their law enforcement duties. These policies were *final* policies until reviewed, altered, changed or amended by the City Manager an/or the City Council as was their unexercised right, power and prerogative. The policies evidenced by and incorporated in the General Orders were clearly promulgated by the then acting Chief of Police and they remained unchanged or repealed and perhaps even unreviewed by the City Council or the City Manager. And until reviewed, altered, amended or repealed, they had the force of law within the Police Department of the City. Their promulgation and adoption by the Chief of Police evidence the establishment of a custom for the Chief of Police of the City of Wichita Falls to formulate and propagate formal policies binding within the Police Department touching upon areas of law enforcement activities. While this custom of allowing the Chief of Police to formulate or establish policy within the Department was not an *express* delegation of final policy-making authority to the Chief of Policy, it was at least an *informal* delegation of such final policy-making authority and gave the Chief *implied authority* to formulate and enforce policy. Therefor, I conclude that with respect to law enforcement activities of officers within the Police Department of the City of Wichita Falls at the time of the Zarnow searches, Chief Kenneth Coughlin was a *potential* final policy maker.

The issue then is whether Chief Coughlin actually created or established any policy (*formal* or *informal*) that was the moving force behind the constitutional

violations. Plaintiff cannot point to any formal policy such as a General Order promulgated by the Coughlin with respect to the scope and manner of seizures of property during a search. Rather than a *formal* policy, Plaintiff claims that Coughlin as a final policy maker condoned or allowed officers to seize items beyond the scope of the express language of a search warrant under an impermissibly broad "plain view" theory, thereby creating policy by *custom or usage having the force of law*. Citing the 5th Circuit's language in *Gros, supra,* in support of this proposition, Plaintiff presents excerpts from the depositions of several of the officers who participated in the search at Zarnow's house and excerpts from Chief Coughlin's own deposition.

Officer Dilbeck who participated in the house search testified on his deposition that he was familiar with the "plain view" doctrine by which "If an officer observes something in plain view that is an obvious violation or something, you know, that's against the law, an officer has the right to seize that object or whatever." To explain the justification for seizing Dr. Zarnow's currency that he kept at his home, Dilbeck opined, "Well, that's an unexplained wealth and large amounts of cash sometimes are fruits of crime, some other crime, and with the fact that there were numerous drug items around, all kinds of drugs throughout the house, there is a possibility that this man might be selling dope, being a doctor or not. So money could be money derived from sale of drugs or from the sale of weapons, so at this point it was just the beginning of our investigation, we took the money, you know, like I say, it's something that can be returned later...So that could be the justification for seizing all the money throughout this."

Again after being asked about the seizure of gold coins, Canadian gold sets, and a block of silver, Dilbeck says "We don't know what all crimes Dr. Zarnow has committed or might have committed. So it's just based on further investigation. We may determine later that he's selling drugs and therefore a lot of this stuff would have been seized.

When further examined as to the justification for seizing every gun in the house , Dilbeck explained that one of the officers involved in the search "contacted the district attorney's office and advised them of just of all the things that were at the house and was advised by Jerry Taylor, I believe it was, from the DA's office to go ahead and take all of the items at that time, all of the weapons and items we thought might be explosive devices at that time."

Explaining the justification of seizing sports model shotguns, Dilbeck testified "Shotguns? Well, they could be prohibited, you know, more investigation could be required to determine if they were or not. You know, checking the serial numbers to make sure they were not stolen. Just the mass quantity of them there is no way we could do that at the scene at that time at night. Lots of reasons could make a shotgun a prohibited weapon, but just a shotgun in and of itself is not generally a prohibited weapon...Like I say, we took all the weapons based on what the DA's office told us and again we are in the beginning stages of our investigation...My answer is going to be the same for every gun you're going to ask about, so we could cut this a lot shorter."

The second officer to be deposed, Officer Kendall, who also participated in the search of Dr. Zarnow's

home, explained the "plain view" doctrine in this manner:

> "If a peace officer is in a place that he has a legal right to be, and he observes something that he thinks is contraband or violates a law or is a piece of evidence, then he doesn't need a search warrant to seize the item. That's a basic, condensed form of what that says."

He goes on to testify that he is not aware of any requirement that an officer contemporaneously document his reasoning or articulate his justification for seizing an item saying:

> "I don't think it's spelled out anywhere that I know of. As far as plain view and why and item is seized or the reason, I'm not aware of any place where it's spelled out that they document their reasoning."

As to the justification for seizing the currency, Kendall opined;

> "This item along with the other currency that was seized early in our investigation. The currency could have been to be used for purchase explosive weapons or devices or prohibited weapons or it could have been from the sale of explosive weapons, prohibited weapons, or even controlled substances or dangerous drugs. So it was taken into custody at this time pending further investigation."

As to justification for seizing the sports model shotguns, Kindall stated;

> "The sheer volume of weapons that he had at his residence, it was not feasible to check all these weapons individually and to see about the legality of possession of them. Often weapons can be converted for other purposes such as launching explosives or converted to full automatic. These often have to be checked by a qualified person or and at a gun range where it's safe to do so."

Chief Coughlin in his deposition testimony confirmed his familiarity with the "plain view" doctrine which he summarized:

> "Well, basically, if in the course or scope of an officer's duties they come across something that's sitting out in the open that would not–you know, would be obviously, say, something of a contraband nature or of an evidentiary nature or something of a particular crime, that's generally accepted that you don't—you can look at it and seize it if it's something that's there in plain view. "They would have to legally be where they would–where they are for a legal reason...."

As to justification for the seizure of an item, Coughlin's deposition testimony went as follows:

> Q. Does the reasoning for seizing the item need to be immediately apparent?
>
> A. Not necessarily."
>
> Q. If an item is seized under the plain view doctrine, what would be the process for

documenting the officer's reason in seizing it?

A. Usually through the course of the investigation that would be included in some—some type of form during that investigation as to what the–what the reason of what they seized was for.

Q. What type of form?

A. Well, I say in some form. I mean...

Q. Okay.

A. –probably generally in–somewhere written in the narrative or some description or something along that lines.

Q. But you do require that they describe their reasoning in seizing that item when they did?

A. I wouldn't say that we require it."

Based upon these testimonial statements in the depositions of Chief Coughlin and Officers Dilbeck and Kendall, Plaintiff argues that an overly expansive "plain view" seizure policy had been established by *custom and usage* within the Wichita Falls police department, which policy had the force of law. Such a policy was impermissibly broad argues the Plaintiff, because it violated the more rigid standards articulated by the United States Supreme Court in *Arizona v. Hicks*, 480 U. S. 321, 107 S. Ct, 1149, 94 L. Ed. 2d 347 (1987) and its progeny. Under *Hicks*,

probable cause is required to invoke the "plain view" doctrine as it applies to seizures.

I find that Coughlin's, Dilbeck's and Kendall's deposition testimony reflected that those officers believed and acted upon an interpretation of the "plain view" doctrine that did not require that the officer seizing items outside the scope of an issued search warrant to have "probable cause" to believe that the item was a evidence of, or fruits of, or instruments of, or constituted a crime but could instead rely solely upon a "suspicion." The warrant for the search of Dr. Zarnow's home was not supported by probable cause.[13] The scope of the items ostensibly authorized under the warrant to be seized were weapons and explosive devices, not currency, drugs, coinage, gold or silver. If the officer's had a right to be where they were because they were not aware of the deficiencies in the warrant under which they were conducting the search and had the right to see what they saw, they did not have the right to seize items that they did not have *probable cause* to believe were the forbidden items, forbidden fruit, of evidence to forbidden activities. There was no exhibition of "exigent circumstances" to proceed with the seizure of these items without first articulating probable cause to a detached magistrate to support the issuance of a warrant. There has been no showing of "special operational necessities" for the seizure to proceed without a warrant.

Post-seizure speculation several years after the seizures as to what an officer might have thought at the time of seizure is insufficient to support a seizure

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[13] *Zarnow*, supra note1, *at page 409.*

of items outside the scope of a warrant, whether the warrant was or was not supported by probable cause and whether or not the officers knew the warrant lacked probable cause or not. This deficiency applies not only to the currency, the coinage, the silver block, and the drugs (prescription or not) but also the guns (like the shotguns) that were not clearly altered or modified in some way as to convert them into prohibited weapons. I conclude that the seizure of these items was an unconstitutional unreasonable seizure.

But this conclusion does not determine the issues before the court as I do find that Plaintiff has failed to present any evidence that these officer's interpretations of the scope and parameters of the "plain view" amounted to a policy of the police department or of the City of Wichita Falls. A mere common misunderstanding of the permissible scope of the "plain view" doctrine does not convert that shared misunderstanding into "policy" for which a municipality may be held liable. This misunderstanding evidenced by the deposition testimony of these officers does no rise to the "force of law." Plaintiff has not demonstrated that there were any other occurrences within the community where this misunderstanding of the "plain view" doctrine led to an impermissible seizure. Nowhere is there proof that this misunderstanding is wide spread or that seizures under this interpretation are well accepted. Proof of random acts or isolated incidents is not sufficient to show the existence of a custom or policy. Isolated violations are not the persistent, often repeated constant violations that constitute custom or policy as required for municipal § 1983 liability. *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995).

There is no showing that this misinterpretation was general or widespread throughout the police force. *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), cert. denied, 506 U.S. 973, 113 S.Ct. 462 (1992). That the chief of police himself was under the same misunderstanding did not make it the policy for his department. Negligence or stupidity alone does not make the City liable.

As regrettable as the unconstitutional invasion of Dr. Zarnow's home and the seizure of Dr. Zarnow's shotguns, currency, coinage, gold, silver, and drugs were, it was not actionable. Plaintiff's Motion for Partial Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted.

So ORDERED this 25th day of February, 2009.

/s/ Robert K. Roach
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

No. 7:01-CV-128-KA
ECF / Referred to the US Magistrate Judge

[Filed February 26, 2009]

DR. ALLEN J. ZARNOW	)
	)
V.	)
	)
CITY OF WICHITA FALLS, ET AL.	)
	)

FINAL JUDGMENT

On the 25th day of February, the Court took under consideration the Motions for Summary Judgment filed by Plaintiff and Defendants in this cause and after considering the motions, the appendices, replies, responses, the summary judgment evidence, the briefs and the arguments of counsel, the Court entered its Memorandum and Order reciting its findings and conclusions and denying Plaintiff's Motion for Partial Summary Judgment and granting Defendants' Motion for Summary Judgment.

Accordingly, the Court renders final judgment for the Defendants and orders that Plaintiff take nothing.

It is further ordered that all costs and attorney's fees shall be borne by the party incurring the same. All relief not granted in this judgment is denied.

This is a FINAL JUDGMENT.

/s/ Robert K. Roach
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10313

[Filed November 15, 2010]

DELORES A ZARNOW,
Independent Administratrix for the
Estate of Dr Allen J Zarnow, Deceased,

Plaintiff - Appellant Cross-Appellee

v.

CITY OF WICHITA FALLS TEXAS;
CHIEF OF POLICE KEN COUGHLIN,

Defendants - Appellees Cross-Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 7:01-CV-128

ON PETITION FOR REHEARING

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

We DENY the petition for panel rehearing but clarify our prior opinion.

On rehearing, Delores Zarnow argues that we failed to describe accurately the allegations she made in district court. The issue is whether we were correct that she did not argue Police Chief Coughlin himself committed a single unconstitutional act sufficient to create liability.

Zarnow points to five pleadings in district court purportedly containing this allegation. The first three were summary judgment pleadings filed prior to the initial appeal in this case. Whatever was claimed then is irrelevant to our issues. Theories of liability not presented in some form to the court in the motion on which a ruling is sought are abandoned; the ignored theories cannot be revived after an unfavorable ruling. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1164 (5th Cir. 1983).

Zarnow's July 30, 2008, motion sought to establish municipal liability by showing the City had an unconstitutional policy regarding the plain view doctrine. She argued the policy was drawn from "one of two sources." That several-page discussion did not raise the point she makes now. Later in the motion, as part of the separate argument that the police chief's policy was the "moving force" behind the constitutional violation, she stated that "governmental liability can be found based even on a single incident of allegedly

wrongful activity." The source of policy and "moving force," however, are independent parts of the analysis for municipal liability. After establishing the source for an official policy, Zarnow needed to show that the policy was the moving force for the violation of constitutional rights. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). There was neither reason nor obligation for the magistrate judge to transform the necessary argument on moving force into an alternative basis to show a policy. The magistrate judge did not even discuss the moving-force requirement because of the conclusion that there was no policy.

Before a party may complain about an issue on appeal, it "must press and not merely intimate the argument during the proceedings before the district court." *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994). Zarnow did not squarely place the "single unconstitutional act" theory before the district court in her motion for summary judgment. Zarnow was clearer about this theory in her subsequent Rule 59(e) Motion for Reconsideration and Rule 60 Motion for Relief. Those motions, though, are not for raising new arguments. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003).

Rehearing is DENIED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 09-10313

[Filed August 23, 2010]

DR. ALLEN ZARNOW	)
	)
Plaintff/Appellants,	)
	)
V.	)
	)
CITY OF WICHITA FALLS, TEXAS & CHIEF KENNETH COUGHLIN,	)
	)
Defendants/Appellees.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS, WICHITA FALLS DIVISION

PLAINTIFF/APPELLANT'S MOTION FOR PANEL REHEARING

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[*Certificate of Interested Persons, Table of Contents, and Table of Authorities omitted in printing this appendix*]

* * *

TO THE HONORABLE COURT OF APPEALS

Now Comes Appellant Deloris Zarnow ("Zarnow") and pursuant to Fed. R. App. P. 40 respectfully files this Petition for Panel Rehearing requesting that the Court reconsider and vacate its August 9, 2010 opinion (App. A), and in support thereof would show:

I.

THE PANEL'S OPINION ERRONEOUSLY HOLDS THAT APPELLANT DID NOT ALLEGE IN THE DISTRICT COURT THAT THE CITY'S POLICYMAKER PERSONALLY COMMITTED AN UNCONSTITUTIONAL ACT.

The Court misapprehended and/or erroneously failed to consider the single instance of unconstitutional conduct by a policymaker as a means of

establishing municipal liability for the violation of Dr. Allen Zarnow's Fourth Amendment Constitutional rights because, according to the Court, "Zarnow did not allege in the district court that Chief Coughlin personally committed such violation," (subsection *b.*, Panel Op. p. 11, App. A), when the record shows that Zarnow has repeatedly argued the single instance issue by a policy maker as a means of municipal liability throughout the course of this litigation and pointed out to the District Court several specific instances where Coughlin personally committed constitutional violations, personally and specifically ordered unconstitutional seizures, personally participated and supervised unconstitutional searches, and personally and deliberately failed to take action when unconstitutional acts were committed in his presence by those under his command.

Argument and Authority

Liability can be imposed on a municipality or county under 42 U.S.C. §1983 when a single act by a policy maker violated the plaintiff's federally protected rights. *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). In *Pembaur*, the Supreme Court held that a county prosecutor was setting policy for the county when he told deputies to "go in and get" persons sought on arrest warrants. In this situation, said the Court, the county prosecutor was acting as "final decision maker for the county, and the county was liable for the, single decision" made by the prosecutor. *id., See also City of St. Louis v. Praprotnick,* 485 U.S. 112, (1988) (Municipality is liable for the actions of its employee only if the action is pursuant to a municipal custom or policy or is that of a final policy maker).

a. Issue Was Raised During the Original Summary Judgments

1. ECF Document 90; R. 5-969

Appellant raised the *Pembaur* single insistence of unconstitutional act by a policy maker issue in her original *Plaintiff's Corrected Motion for Summary Judgment* filed November 29, 2005. R. 5-969, ECF Doc. 90, App. B. In the "Fact" section of this Motion, Appellate argued to the District Court the undisputed fact evidence that Chief Coughlin ordered that officer obtain a search warrant for Dr. Zarnow's residence when there was no probable cause for such a warrant. App. B. p. 16. That decision directly caused a violation of Appellant's Fourth Amendment rights. *See Pembaur* at 484. The scenario of the this case is almost identical to the that in *Pembaur* where the prosecutor merely told the deputies to "go in and get" those individuals who warrants had already been issued. *Id.* Just like the prosecutor in *Pembaur,* Chief Coughlin "made a considered decision based on his errant understanding of the law" and commanded the officers to obtain a search warrant and seize property with probable cause. *Id.*

In her brief, Appellant argued to the District Court:

> "In *Pembaur v. City of Cincinnati*, a majority of the Court held that a single decision by an official with policymaking authority in a given area could constitute official policy and be attributed to the government itself under certain circumstances." App. B, p. 17-18 (subsection titled "City's "Plain View" Policy").

Appellant further argued to the District Court that:

"The Wichita Falls Police Department has an unconstitutional custom and practice of seizing items where the incriminating nature of the items is not immediately apparent. The former Chief of Police Coughlin and final policy maker for procedural matters for the police department in July 1999, explained the "plain view" seizure policy of the WFPD this way:

> "you will often seize a lot initially until you rule things in or out. Anything that could possibly be evidence is — during a search warrant— that's your opportunity, at that point, to collect whatever you believe to be evidence or potential evidence... It's just the opportunity to seize anything that could be connected to any kind of crime."

App. B, p. 18

It was further argued to the District Court by the Appellant that Chief Coughlin actively participated and was involved in the discussions and directives of the activities at Dr. Zarnows office on July 13, 1999, including the seizure of property where the incriminating nature of the items was not immediately apparent before being seized and where the character of that property was not such as to give the officers "probable cause to associate the property with criminal activity. *Citing Payton v. New York*, 445 U.S. 573, 587,(1980); Id.

Appellate further argued to the District Court:

> "Chief Coughlin who was the Chief on July 13, 1999, and the final policy maker for the Police Department, has a policy that a seizure under the "plain view" doctrine need not require that the incriminating nature of item be "immediately apparent." This broad-brush policy allows officers, acting under the pretense of search warrant, to grab anything of uncertainty or value in hopes that it will someday be evidence or forfeited."

App. B, p. 20.

Appellate also further argued to the District Court:

> "Even though Dr. Zarnow was a practicing physician and drugs were not listed as items to be seized by the search warrant, a decision was made that all medications would be seized and Officer Spragins was assigned the duty to log all drug evidence seized. Spragins used a different form which had columns for evidence description, where it was found and by whom. This report shows that Sgt. Kendall, Officer Taylor, Lt. Cummings, Officer Rameriz, Det. Dilbeck, Sgt. Kisinger, and **Chief Coughlin** all **participated in the search and seizure pharmaceutical medications** in the possession of Dr. Zarnows. This seizure report shows that there were no "illicit street drugs" found and that Chief Coughlin was the officer

> in charge. These items seized were outside the scope of the search warrant and under the circumstances not immediately apparent to be incriminating in nature."

App. B, p 31. (Emphasis added).

2. ECF Document 93; R 7-1501

Appellant also raised in the District Court the constitutional violation by a policy maker issue throughout *Plaintiff Dr. Allen Zarnow's Response to Defendant City of Wichita Falls's Motion for Summary Judgment* filed December 12, 2005. R. 7-1501, ECF Doc. 93. App. C. Appellant argued to the District Court that:

> "...when a government decision maker, such as Chief Coughlin, has the final authority to establish governmental policy with respect to the action ordered or omitted, and a deliberate choice to follow a course of action is made from among various alternatives, governmental liability can be found based on a single incident of allegedly wrongful activity."

App. C, p. 7-8. Again citing *Pembaur*.

Appellate further argued to the District Court that the deliberate course of action taken by Chief Coughlin was that he "chose to seize items that were not listed in the warrant, but under the flawed "plain view" doctrine that he espouses." App. C. p. 8.

Appellate continued to argue that "these incidents of wrongful activity by the Chief, in conjunction with the litany of other incidents outlined in Plaintiff's Motion for Summary Judgment, were sufficient under *Pembaur* to impose liability on the City." See Id.

3. ECF Document 97; R. 7-1595

Appellant also raised the issue of unconstitutional policymaker conduct by Chief Coughlin throughout her *Plaintiff Dr. Allen Zarnow's Response to Defendant Officers' Motion for Summary Judgment* filed December 12, 2005. R. 7-1595, ECF Doc. 97. App. D. Appellant argued to the District Court that:

> "The evidence shows that Defendants Conghlin, Todd, Cummings. and Kendall conspired to violate Dr Zamow's Fourth Amendment rights by working in concert, discussing, and deciding to use Sgt. Mills as an instrumentality of the police department to conduct a warrant-less search of Dr. Zarnow's office and desk. (Kendall Dep. at 32, 39, 52, 54, Exhibit F) *See Coolidge v, New Hampshire*, 403 U.S. 443, 487 (1971). Here, it was known to these Defendant Officers that Sgt. Mills was entering the Clinic to search the premises and to seize items from within, without a search warrant. Sgt. Mills also knew that he was performing the search with the intent to assist law enforcement. (Off. Exs. 25-6) *See United States v. Bazen* 807 F.2d 1200, 1203-04 (5th Cir. 1986). Utilizing Army Sgt Mills in this manner not only violated the Fourth Amendment, hut it also violated the prohibitions of 18 U.S.C. § 1385, better known as the "Posse Comitatus Act.""

App. D, p. 10-11.

Appellate further argued to the District Court that Chief Coughlin utilized U.S. Army Sergeant Mills to conduct illegal searches, acting as an agent or instrumentality of the state, and the constitutional guarantees associated with searches and seizures, therefore, apply fully. *Citing Hall v. State*, 643 S.W.2d 738 (Tex.Crim.App. 1983). App. D, p. 12.

Appellate further argued to the District Court that Coughlin personally gave direct orders to seize property that was outside the scope of the search warrants executed at his residence on July 14, 1999:

> "Plaintiff will further show the Court the additional evidence that on the July 14, 1999 search of his residence, property was seized that was outside the scope of the warrant that did rot constitute contraband or evidence of an incriminating nature that was immediately apparent to officers conducting the search. *See Arizona v. Hicks* 480 U.S. 321, 326-27 (1981). Sgt Kisinger and another officer were searching the Plaintiff's bedroom and Defendant Chief Coughlin walked in the room and asked what they had found. (Kisinger at 69, Exhibit N). Kisinger showed the Chief the items they collected. Id. Defendant Coughlin asked Kisinger why he had not seized the pharmaceutical medication that were in plain view but not listed in the warrant to be seized. Kisinger, who happened to be the drug enforcement supervisor at the time, explained that these were the type of drugs that a physician would have and that he saw no reason to take them. Id. Coughlin, without explanation, ordered Kisinger to seize the medications. Id.

> Assistant District Attorney Gerald Taylor also finds it difficult to understand why pharmaceutical medication and large sums of money possessed by a physician would be seized. (See Taylor Dep at 59-60, Exhibit S)."

App. D. p. 13.

In the subsection titled *July 16th Seizures Were Outside the Scope of the Search Warrant,* Appellant pointed out to the District Court that Chief Coughlin and other officers executed a second search warrant of Zarnow's home on July 16, 1999, calling for the search and seizure of "various types model rocket motors, adaptor grenade launchers, any devices designed, made, or adapted for the delivery or shooting an explosive weapon, and any other item that may he unknown to affiant that constitutes evidence in this case. Documentation of any such devices, to include video tapes, instructional manuals arid photographs"

In this search, Coughlin personally executed and supervised the search where officers again went outside the scope of the warrant and seized pharmaceutical medication that was in plain view but not listed in the warrant and seized thousands of rounds of ammunition of various calibers, and materials identified as potentially explosive all legally possessed by the Plaintiff. App. D, p. 14.

b. The Issue was Briefed in Plaintiff's Rule 59e Motion for Reconsideration

ECF Doc. 196: R. __-3506

In *Plaintiff's Rule 59e Motion for Reconsideration*, R. __-3506, ECF Doc. 196, App. E., filed March 13, 2009 in the District Court, Appellant dedicated an entire section titled "Single Incident by Final Policymaker." App. E. pp. 14-17. In this motion, Appellate briefed the municipality liability associated with the single act of a final policymaker and re-identified six (6) events by Chief Coughlin, the City's policymaker, that binds the City's liability in the 1983 action. Those events are as follows:

> "Chief Coughlin was "responsible and in charge," acting as a final policymaker for the City in his official capacity when:
>
> > "(1) on July 13, 1999, he ordered or tacitly approved an order to obtain a search warrant, without probable cause, to search Dr. Zarnow' s home;
> >
> > "(2) on July 13, 1999, he stood by at Dr. Zarnow's office while officers under his command, seized lawful personal items from Dr. Zarnow's desk, file cabinet, and office without probable cause;
> >
> > "(3) on July 14, 1999, he stood by at Dr. Zarnow's home while officers under his command, seized lawfully owned and possessed property of Dr. Zarnow without probable cause;

> "(4) on July 14, 1999, during the execution of an illegal search warrant at 4500 Ridgmont, he personally seized property outside the scope of the illegal search warrant and without any probable cause;
>
> "(5) on July 14, 1999, he gave a direct order to a supervisor to seize lawfully owned and possessed property of Dr. Zarnow without probable cause;
>
> "(6) on July 16, 1999, he stood by at Dr. Zarnow's home while officers under his command, seized lawfully owned and possessed property of Dr. Zarnow which were outside the scope of a search warrant and without probable cause."

App. E. pp. 16-17

These six factually based incidents were not in dispute during the second round of summary judgment because they had been presented in the first round of summary judgment and Chief had, for the most part, admitted these event. (See Appellate's Opening Brief at 23-31, 35 citing the Appellate Record).

Appellate further argued to the District Court that "[A]ny one of these acts or omission are the result of Chief Coughlin's deliberate indifference to Dr. Zarnow's constitutional rights and is enough to render the City liable under §1983." App. E. 16-17.

c. *The Issue was Again Briefed in Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Reconsideration*

In *Plaintiff's Reply to Defendant's Response (Doc. 200) to Plaintiff's Rule 59(e) Motion for Reconsideration (Doc. 196) & Plaintiff's Motion for Relief from Judgment pursuant to Rule 60,* R.__-3855, ECF Doc. 202, App. F., filed March 30, 2009 in the District Court, Appellate re-argued and the single unconstitutional incident by a policy maker issued and explicitly cited the same information Appellant has argued above in this Petition for Panel Rehearing. *See generally* App. F. pp. 8-13.

Appellate specifically argued to the District Court:

> "Plaintiff agrees that the undecided police-maker issue was a matter of law question for this Court to decide and the Court correctly ruled on that matter, opening the door for municipal liability for any single decision, act, failures to act or omission by the policy-maker that resulted in a constitutional violation of Plaintiffs rights. *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986). Plaintiff does not dispute that "City believed all matters as to the City's liability remained fact issues" but in the first round of summary judgment, Plaintiff raised those factual issues in its own motion for summary judgment (Doc 90)[footnote deleted], its response to the City's *first* motion for summary judgment (Doc. 93) [footnote deleted] and in response to the Defendants Officers' motions for summary judgment (Doc. 97) [footnote deleted] including Chief Coughlins.

> There is no doubt that the Defendants have always held the position that they did nothing wrong despite the overwhelming evidence and argument put forth in the first round of summary judgment. In making the ultimate determination of whether summary judgment was proper, the Court reviewed the facts, and all inferences drawn from those facts, in the light most favorable to the party opposing the motion. *See Jurgens v. EEOC*, 903 F.2d 386, 388 (5th Cir. 1990). The Court found several fact issues which precluded the City from obtaining summary judgment as outlined in Plaintiff's 59 (e) motion for reconsideration. The City did not bring forward any new evidence or to rebut the Court's denial but rather reworded their motion for a second bite at the apple. Plaintiff believes that she should not have had to re-argue the same issue already decided, assent (sic) any new evidence or a change in the substantive law. And here there simply was nothing new, and the Court's previous ruling should stand."

App. F, pp. 8-12

In her "Conclusion" Appellate argued to the District Court:

> "It is undisputed that Chief Coughlin was involved from the very beginning of this case. Chief Coughlin's role as Chief of Police ultimately made him the person in charge in every instance where he was present. Where he was present, he had duties to supervise, and direct those activities under his command. His decisions, actions, inactions, or any acquies-

cence of those under his supervision would bind the City's liability as a final policymaker. Plaintiff in this case has demonstrated numerous events of unconstitutional behavior on the part of those under Chief Coughlin's command. His failure or refusal to take command is his endorsement of those unconstitutional behaviors and binds the city's liability."

"The direct order that Chief Coughlin gave to Sgt. Kisinger to seize pharmaceutical medications violated Plaintiff's constitutional rights. (See. Fn. 12, supra.) [omitted] This was raise and argued in Plaintiff's first response to summary judgment (Doc. 97) and the only thing that has changed is that the Court has ruled that Chief Coughlin is a final policy maker, and that the seizures were unconstitutional. It was argued before this Court in Plaintiff's motion for summary judgment that Chief Coughlin, ordered detectives Collier and Dilbeck to obtain search warrants for Dr. Zarnow's office and his residence, the latter of which has been rule unconstitutional by this Court as well as the Fifth Circuit.(See fn. 10, supra) [omitted]. Plaintiff has also cite other events in its Motion for Reconsideration where the Chief's decisions, actions, and inactions were the foundation of unconstitutional acts against Plaintiff. There are more incident that Plaintiff has already shown to the Court but because her time has run short is unable to demonstrate at this time."

App. 7, pp. 12-13.

II.

THE PANEL'S OPINION ERRONEOUSLY HOLDS THAT APPELLANT'S BRIEF DID NOT ASSERT THAT CHIEF COUGHLIN WAS PERSONNALLY INVOLVED IN AN UNCONSTITUTIONAL ACT.

The Court misapprehended and/or erroneously failed to consider the single instance of unconstitutional conduct by a policymaker as a means of establishing municipal liability for the violation of Dr. Allen Zarnow's Fourth Amendment Constitutional rights because, according to the Court "[T]he brief does not assert that Coughlin was personally involved with the violation itself."(subsection *b.*, Panel Op. p. 11, App. A).

On page 1 of the Appellates Brief, in its Statement of the Issues Presented for Review, stating the issue before the Court of whether the City is entitled to summary judgment given that the Chief of Police was a policymaker and Appellate presents six undisputed personal acts of conduct or omissions by the Chief of Police to wit:

> "(1) where the Chief of Police on July 13, 1999 ordered or approved an order to obtain a search warrant, without probable cause, to search Dr.Zarnow's home;
>
> (2) where the Police Chief on July 13, 1999, failed to take command and to supervise while officers uder his command seized property without probable cause from Zarnow's office;

> (3) where the Police Chief on July 14, 1999, failed to take command and to supervise while officers under his command siezed property in Dr. Zarnow's home without probable cause;
>
> where the Police Chief himself, personnally seized property without probable case; and
>
> where the Police Chief gave a direct order to a supervisor to seize property of Dr. Zarnow without probable cause; and
>
> (4) where the Police Chief, on July 16, 1999, failed to take command and to supervise while officer under his command seized property of Dr. Zarnow, which was outside the scope of the search warrant and without proble cause."

Appellant's Brief at 1-2.

These same acts were repeated in the Policymaker Acts' or Omissions sections of Appellate's Brief on page 54, following the arguments by Appellate that "government liability under § 1983 can be found based on a single incident of alleged wrongful activity." Appellate's Brief at 53, citing *Perbaur* 475 U.S. 483; *Turner v. Upton,* 915 F2d. 133, 137 (5th Cir. 1990); *Steele v. Van Buren,* 845 F2d. 1492, 1495 (8th Cir. 1988). Appellate's brief further argues that "...where action is directed by those who establish governmental policy like Chief Coughlin, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Appellate's Brief at 53, citing *Perbaur*, 475 U.S. at 481.

Finally, in the Appellate's Conclusion she stated; "[T]he Court rightfully found that Chief Coughlin was a policymaker for the City when it comes to law enforcement activities, and as such, any one of the six listed unconstitutional acts or failures to act should be sufficient to bind the City's liability and defeat summary judgment. Appeallate's Brief at 59.

CONCLUSION

As demonstrated herein, Appellate has repeatedly raised the single instance of unconstitutional conduct by a policymaker as a means of establishing municipal liability for the violation of Dr. Zarnow's fourth amendment rights in the District Court and did not raise the issue for the first time on appeal. In addition to being "present and in charge" and doing nothing to stop unconstitutional conduct, Coughlin's personal actions violated Dr. Zarnow's fourth amendment rights. The first was when he ordered officer to obtain a search warrant for Zarnow's home when there was no probable cause. The second was when Coughlin ordered Sgt. Kissinger to seize medications where there was no probable cause to do so. And the third was when Chief Coughlin himself seized Dr. Zarnow's medication without probable cause.

The City is not entitled to summary judgment.

Prayer

Appellate prays that this Court GRANT this petition for rehearing, vacate section b of its Opinion of August 9, 2010, reverse the District Court's Grant of Summary Judgment for the City, and remand this case to the District Court for trial on the merits.

[*Certificate of Service and Certificate of Compliance, omitted in printing this appendix.*]

* * *

[*Appendix A to this Motion omitted here and reproduced at 1a*]

* * *

(2)

No. 10-1036

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 23 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELORES A. ZARNOW, Independent Administratrix for the Estate of Dr. Allen J. Zarnow, Deceased,

Petitioner,

CITY OF WICHITA FALLS, TEXAS; CHIEF OF POLICE KEN COUGHLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner presented a compelling reason to grant the Petition when the Fifth Circuit applied the well established law of the case doctrine affirming the District Court's exercise of its discretion to permit a second motion for summary judgment filed at the request of all the parties, after notice, and an opportunity to fully brief and present evidence on the issue of municipal liability, despite an earlier interlocutory order denying summary judgment?

2. Whether the Petitioner has presented a compelling reason to grant the Petition, when the Fifth Circuit applied well established municipal liability principles and affirmed the District Court's decision that no unconstitutional municipal conduct occurred without evidence of specific incidences or the implementation of a widespread practice predating the events at issue?

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STATEMENT OF THE CASE

The Fifth Circuit's August 9, 2010 decision dismissing Petitioner's 42 U.S.C. §1983 municipal liability claim rested on: (1) the application of familiar municipal liability concepts and the lack of evidence of any unconstitutional conduct by the municipality, (PET. APP. 12a); (2) the application of familiar procedural principles and evidentiary burdens in a summary judgment context and the waiver of arguments by the Petitioner at the district court and appellate court levels, (PET. APP. 14a); and (3) the widely accepted and established precedent that the law of the case is a doctrine of discretion and interlocutory rulings are subject to change by the district court. (PET. APP. 17a).

The rare factual situation addressed in this case arose when a city's police force responded to a clinic's report of possible explosives on site that eventually led to the discovery of a doctor's possession of explosive materials, a cache of automatic weapons, large amounts of cash, numerous weapons and thousands of rounds of ammunition. Dr. Allen Zarnow originally brought suit under 42 U.S.C. §1983 and the Texas Constitution claiming that his rights were violated after local and federal fire and law enforcement and military personnel responded to a report of explosive materials in his office at a local medical clinic. This initial reporting and the follow up investigation culminated in the issuance of several warrants, several searches and specific seizures of Zarnow's property which the district court and the Fifth Circuit found did not constitute unconstitutional "municipal" action. (PET. APP. 16a).

Zarnow sued eight identified, as well as other unidentified, police officers, along with the City of Wichita Falls and its Police Chief Kenneth Coughlin, in his official capacity, claiming constitutional deprivations of rights through the Second, Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and state law violations. All parties moved for summary judgment and the City and officers also moved to dismiss on the pleadings. Petitioner Zarnow[1] dismissed and abandoned numerous claims throughout the proceeding, including all state claims. The district court analyzed and initially dismissed all remaining claims except for the Fourth Amendment allegations. The district court then dismissed some but not all officers, and, following the individual officers' successful appeal of the denial of qualified immunity, dismissed all of the individuals, leaving only the claims against the municipality.

After the qualified immunity appeal and dismissal of the individuals, the district court permitted all parties to file a second summary judgment motion addressing the facts and focusing on the requirements for municipal liability. Following notice, and with motions, responses and replies submitted by all parties (PET. APP. 20a), the district court granted summary judgment on the City's motion that there was no unconstitutional municipal policy or custom, and dismissed the Petitioner's claim that the City's actions had created any basis for liability. (PET. APP. 38a-39a).

---

1. Allen Zarnow died in 2006 and his representative, Delores Zarnow, has been substituted as the party Plaintiff. R9: 2198, and is the Petitioner.

The district court concluded that Petitioner had no evidence of any express unconstitutional policy adopted or promulgated by the City's official policymakers and no evidence establishing a persistent pattern of unconstitutional conduct sufficient to demonstrate a custom of the City. (PET. APP. 38a). All of Petitioner's evidence presented to the trial court focused on the actions of the officers in this one incident. (PET. APP. 36a). Zarnow did not present evidence in response to the summary judgment that raised even one other specific instance of another claimed unconstitutional search or evidence of any specific instance in which the misuse of the plain view doctrine resulted in another claimed constitutional violation. (PET. APP. 38a). Although Zarnow responded to the City's motion, the district court determined that the response failed to raise a fact issue on the claims of unconstitutional conduct through any custom or policy attributable to the City. (PET. APP. 38a). The district court granted summary judgment in favor of the City and the Police Chief in his official capacity. (PET. APP. 39a).

On appeal, the Fifth Circuit determined that the district court correctly concluded that there was no evidence establishing a persistent pattern of unconstitutional conduct sufficient to establish a municipal custom, as "improbable inferences" and "unsupported speculation" are not proper summary judgment evidence. (PET. APP. 12a). Finding that Petitioner failed to meet her burden to introduce evidence to support any claim of inadequate training, (PET. APP. 16a), and waived any theory of single instance policymaker action by failing to timely present it to the district court or to the appellate court (PET. APP. 14a), the Fifth Circuit ultimately rejected the Petitioner's attempt at municipal liability. Without evidence raising

any other incident of specific unconstitutional conduct, or a pattern of unconstitutional conduct occurring for so long and with such frequency as to constitute a custom of the City, the Fifth Circuit refused to find municipal liability. (PET. APP. 12a). It affirmed the district court's finding that there was no proof sufficient to raise a fact issue on any asserted violation of Zarnow's Fourth Amendment rights by the City's actions (PET. APP. 16a), as opposed to the individual action of its officers.

The Fifth Circuit rejected Petitioner's assertion that the law of the case doctrine restricted the district court's power to grant a separate summary judgment motion filed after notice to all parties with an opportunity to respond, even though the Court had, by its earlier interlocutory order, previously denied an earlier summary judgment motion. (PET. APP. 17a).

It is from the final order granting summary judgment in favor of the City, and the Fifth Circuit opinion supporting that dismissal, that this petition seeks review.

REASONS TO DENY PETITION

I. NO CONFLICT IN AUTHORITY BETWEEN THE CIRCUITS OR UNDECIDED FEDERAL QUESTION EXISTS.

Petitioner has sought review of the decisions below by relying on the discretionary doctrine known as the law of the case and by relying on a claimed misapplication of the requirements for municipal liability to these specific facts. The decisions below do not conflict with a decision of this Court or any Court of Appeals. The basis for dismissal

does not raise an important federal question undecided by this Court. Respondents oppose this review as Petitioner does not set forth, nor are there, any compelling reasons for the grant of the Petition or the exercise of this Court's limited resources.[2] See Sup. Ct. R. 10.

Petitioner makes a feeble attempt to claim that there is a circuit split and important federal question concerning the Fifth Circuit's refusal to find that the law of the case doctrine applied to limit the power of the district court to consider its own prior interlocutory rulings. This question – whether the law of the case doctrine applies to interlocutory decisions made by the same district court, (i.e., whether the denial of summary judgment by a district court precludes its later decision to grant a second summary judgment in a totally separate subsequent submission) – is one that the Courts agree is a matter of a court's discretion, not of its power. Petitioner misrepresented the procedural history in the case claiming she had no notice of the motions' consideration, when the record establishes she was given notice and an opportunity to respond to the summary judgment motion and, in fact, actually responded to the motion. (PET. APP. 20a). Respondents submit that this Court should refuse the Petitioner's request, which is based on an unsubstantiated conflict in authority or claim of federal importance and on a misrepresented record. This requested review based on the law of the case doctrine is not supported by this Court's reasoning in the recent case of *United States v.*

2. The City disagrees with the policymaker determination reached in the decision below, but recognizes the limiting language of the opinion "to these facts" and the summary judgment posture of the case, which effectively precludes any appropriate basis for a challenge requesting this Court's review of that limited decision.

Pepper, 131 S.Ct. 1229, 1250-51, 179 L.Ed.2d 196, 2011 U.S. Lexis 1902 (2011).

Petitioner's second request for review also glosses over any requirement to demonstrate a compelling reason for this Court's consideration of the Petition. She claims an important federal question is presented but then simply argues that the Fifth Circuit failed to properly apply existing applicable law on municipal liability. The Fifth Circuit properly rejected Petitioner's attempt to use unsupported inferences and speculation as evidence to establish a policy or to consider individual actions in one incident as evidence of a custom. The Petition fails to demonstrate a compelling reason for review as Petitioner had no evidence of the municipality's unconstitutional conduct. This requested review of municipal liability should be foreclosed by this Court's reasoning in the recent case of *Connick v. Thompson*, 131 S.Ct. 1350, 1360-61,179 L.Ed.2d 417, 2011 U.S. Lexis 2594 (2011).

In essence, the Petition merely requests this Court to act as an additional tier of review for one district court's exercise of its decision making discretion over its own orders in permitting and granting a second summary judgment motion on a municipal liability claim.

II. LAW OF THE CASE IS A DISCRETIONARY DOCTRINE NOT A LIMITATION OF A COURT'S POWER OVER ITS OWN RULINGS.

Petitioner requests that this Court review the Fifth Circuit's refusal to use the law of the case doctrine to limit the district court's power, upon summary judgment submission, to dismiss her claim. (PET. APP. 8). At the heart of her argument is the contention, which is unsupported

in the record, that she was prejudiced by the lower court's consideration, without notice, of a second motion for summary judgment by the City. (PET. APP.8). This Court should deny the Petition for Certiorari because:

(1) The law of the case is a doctrine of discretion that does not apply to prevent a district court from properly exercising its power to consider and alter its interlocutory decisions and dismiss a claim when no evidence supports it; and

(2) Zarnow had notice of the district court's intention to consider, and an opportunity to respond to, any motion filed by the City prior to the court's decision. Petitioner's claim of "no notice" misrepresents the undisputed facts and procedural history as she was aware that a summary judgment motion could, and would, be filed by the City and, in fact, a response was filed to the motion.

A. The Orders Were the District Court's Own Interlocutory Decisions on Separate Submissions.

The law of the case is a doctrine of judicial discretion rather than a limitation of judicial power when a court reviews its own decisions. *See, e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) relying on *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). In the last three months, this Court has confirmed that the law of the case doctrine is one that "directs a court's discretion," not one that operates to "limit the tribunal's power." *United States v. Pepper*, 131 S.Ct. at 1250-51, citing *Arizona v. California*, 460 U.S. 605, 618 (1983).

In *Pepper*, the Court briefly discussed the reasoning supporting the amorphous discretionary doctrine but refused to apply the law of the case to hold that a prior decision which considered the evidence of various factors presented to the Court at the time of one sentencing should control a subsequent sentencing decision which was presented and decided at a later time. *United States v. Pepper*, 131 S.Ct. at1250-51. The same logic should apply to summary judgment decisions on separate motion submissions presented at two different times.

Petitioner misrepresents that there is a split in the circuits when the Courts of Appeal agree that an interlocutory order, i.e., the denial of a motion for summary judgment, remains open to change by the district court and its consideration is not precluded by the law of the case doctrine. *Bethlehem Steel Export Corp. v. Redondo Construction Corp.*, 140 F.3d 319, 321 (1st Cir. 1998); *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2D 131, 134-36 (2nd Cir. 1956) and reh'g denied, 231 F.2d 867 (1956); *Daniels v. McKay*, 607 F.2d 771, 773-774 (7th Cir. 1979); and *Moseley v. City of Northwoods*, 415 F.3d 908 (8th Cir. 2005).

B. Petitioner Had Notice and Had Responded Before Consideration of Second Motion by District Court.

To avoid the widely accepted rule that a court retains the power to change its own interlocutory rulings, the Petitioner cites district court decisions, thrown in with circuit court authorities that do not conflict with the rulings below, in the hope of constructing an escape hatch. Petitioner complains of the district court's consideration

of a second motion for summary judgment by the City, inaccurately representing the record by claiming that this consideration was without prior notice to her. The Petition incorrectly states the district court "inexplicably and without notice reversed its own opinion" (PET. 15) and "prejudiced Zarnow greatly in failing to even give the opportunity to present evidence or argument on the issues ...." (PET. 16). Her challenge lacks merit because she not only received notice of the court's intent to permit the motion, she responded to the motion before the court considered it.

Petitioner has misrepresented the history related to the district court's consideration of the second motion as the record shows that in ruling, the district court considered motions and extensive responses and replies and appendices. (PET. APP. 20a). Following an appeal that (a) reversed the district court's decision denying qualified immunity for the individuals and (b) dismissed any requested review on appeal by the City because of a lack of jurisdiction, *Zarnow v. City of Wichita Falls*, 500 F.3d. 401, 406-407, 409-411 (5th Cir. 2007), the district court conducted status conferences for disposition of the causes remaining after appeal. R10: 2269, 2272. The district court also ordered the parties to file a report indicating the matters remaining for decision. R10: 2269, 2272. In the report, Petitioner requested the court permit additional summary judgment filings and requested a hearing on whether the parties should be granted leave to file dispositive motions. R10: 2301-2312, 2303-2304, 2309. SRE: 4. The court agreed but established additional pretrial deadlines for ***all parties*** to file motions and on June 4, 2008, ordered that "**Plaintiff and Defendants** shall be permitted to file dispositive motions (motions to

dismiss/summary judgment) (total or partial) ..." R10: 2315. SRE: 5.

Petitioner knew of the deadline contained in the order because on July 2, 2008, and July 30, 2008, the court ordered by *agreement of the parties*, an extension of the date for submission of dispositive motions. R10: 2322, 2414. SRE: 6, 7. The court set a deadline for responses to dispositive motions, R13: 3185, which was also extended by agreement of the parties. R13: 3187, 3189-3194; R14: 3257, 3259. The court specified a date for filing replies to the responses to dispositive motions and that deadline was also extended by agreement of the parties. R13: 3185; R14: 3476, 3478 and 3486. The district court's orders and Petitioner's agreements demonstrate her knowledge of the need to respond to the City's motion and her misrepresentation of the record before this Court.

Petitioner's claim of prejudice because the court gave no notice that it would consider a second summary judgment motion of the City is unfounded. The very issues raised by the City's summary judgment motion are outlined in the joint report filed with the district court. R10: 2301-2312. More than four months before filing her response, Petitioner knew that the district court was permitting *all parties* to submit new summary judgment motions and responses. In fact, Petitioner filed a response to the City's second motion and never objected to the district court's consideration of the second motion before it was granted. R13: 3195 -R14: 3256. Petitioner not only knew that responses were necessary but knew the specific content of the City's arguments that needed response as early as August 13, 2008. R10: 2469.

Only after the court granted the City's motion and dismissed Petitioner's claim, did she contend that the court's previous denial of a summary judgment motion should fall within the law of the case doctrine to bar the court's consideration of the second motion for summary judgment. Her requested review in this Petition based on prejudice related to the second summary judgment submission finds no support in the facts.

C. District Court's Decision To Consider Second Summary Judgment is Reviewed for Abuse of Discretion.

Having notice that the second motions would be considered, Petitioner's law of the case argument is reduced to whether the district court, having once denied a summary judgment, abused its discretion by granting a separate summary judgment motion even when there is a lack of evidence supporting any continued claim for liability.

Petitioner claims no new evidence was introduced in the second round of motion submissions. (PET. 15). This is a misrepresentation of the record as additional evidence of instances in which the City Council exercised its authority over the Police Chief and Police Department were provided in the submissions. R14: 3340-3369. SRE: 10.

Petitioner's contention that the prior motion denial should prohibit dismissal because the City failed to file a motion for reconsideration or alteration lacks merit. The district court initially found that there was a fact issue as to whether Coughlin was a policymaker for the City (a clearly erroneous finding as this presents a

question of law, not fact) which could not be reviewed in the first appeal because of the lack of a final order. *See*, *Zarnow v. City of Wichita Falls*, 500 F.3d at 406. Denial of a summary judgment motion is not ordinarily a final appealable order. The Fifth Circuit did not review the merits of that decision on appeal, it simply dismissed for lack of jurisdiction. *Zarnow v. City of Wichita Falls*, 500 F.3d at 406-407. A dismissal for lack of jurisdiction does not review the underlying ruling. *Mann v. Merrill-Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973).

To accept Petitioner's position would dictate that once the court denied one motion for summary judgment, it must always deny all summary judgment motions. The law of the case "is a rule of convenience and utility and yields to adequate reason, for the predecessor judge could always have reconsidered his initial decision so long as the case remained in his court." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983). To utilize the law of the case doctrine Petitioner should be required to demonstrate that when the court denied the City's motion, the issue of the City's liability was actually decided. The law of the case should not apply to a court's *denial* of a summary judgment motion because it is not an order which carries forward a decision on the merits. The case law provides no support for that position, as illustrated by the case of *Alpha/Omega Ins. Serv., Inc. v. Prudential Ins. Co. of America*, 272 F.3d 276, 283 (5th Cir. 2001) and reh'g denied, and *Mosley v. City of Northwoods*, 415 F.3d at 911. (Grant of City's second motion for summary judgment upheld despite denial of prior motion). The law of the case doctrine does not deprive a district court of its ability to reconsider its own rulings. *City of Conrod v. David*, 120

F.3d 92, 95 (8th Cir. 1997), cert. denied, 523 U.S. 1081 (1998).

Summary judgment motions are a procedure designed for judicial economy and efficiency. The law of the case is a practical rule of judicial discretion also designed for judicial economy and efficiency. Should this Court determine that the prior denial of a motion for summary judgment invokes the law of the case doctrine, the City contends that the court properly exercised its discretion permitting a second summary judgment consideration because:

(1) it is more judicially efficient to reconsider the City's judgment entitlement applying the proper requirements to a municipal liability claim than to require a trial when no fact issue as to the City's liability exists.

(2) the number of parties and claims addressed in the first round of dispositive motions made it too difficult to isolate and focus on the specific requirements for municipal liability analysis.

The district court properly exercised its discretion considering the nature of the proceedings and the case context. In this case context, there was no final determination by the lower court nor appellate review of that determination as it relates to the City's first summary judgment motion to implicate the law of the case. No basis exists to reverse the analysis of the Fifth Circuit or the district court's subsequent consideration and dismissal of the unsupported municipal claim.

III. THE COURTS' RULINGS REQUIRING PROOF OF A PATTERN FOR "MUNICIPAL ACTION" ARE CONSISTENT WITH THIS COURT'S AUTHORITY.

This Court should deny the Petition for Certiorari because the United States Court of Appeals for the Fifth Circuit and the district court correctly determined that the Petitioner's "evidence" did not reveal any unconstitutional policy or custom of the City, the application of which resulted in harm to Zarnow.

Petitioner claims that the City has an unwritten municipal custom of warrantless seizures in violation of the Fourth Amendment. The specific facts in this case reveal that five separate warrants were secured by officers, not that warrantless searches were being conducted. The entire theory of municipal liability advanced by Petitioner rests on what the Fifth Circuit properly characterizes as "improbable inferences" and "unsupported conclusions." Petitioner admittedly has no evidence of any formal, written policy which she alleges caused her unconstitutional harm. Simply put, Petitioner wants this Court to disregard its own decisions and long standing precedent to find that she can establish the existence of an unconstitutional "custom" without having *any* evidence that the actions complained of were widespread or occurred with regularity. Zarnow admittedly has no evidence of other specific incidents where officers of the Wichita Falls Police Department impermissibly seized items because of the intentional misapplication of the "plain view" doctrine. Zarnow attempts to promote the novel theory that because he presented "evidence and direct testimony" of a custom,

that a "pattern" is not required (PET. BRIEF 18-19). While admitting that "many incidents" would be required to prove the existence of a "custom"; Zarnow inconsistently asserts that "where the policy is proved by Defendants, proof of incidents involving other citizens is unnecessary." *Id.*

Petitioner's claim that she presented "uncontroverted proof that Police Chief Coughlin testified to the procedure employed by the City of Wichita Falls when seizing property that is not listed in a search warrant" is a misrepresentation of the evidence. Coughlin did not testify as to *any* specific procedure that was "employed by the City" or utilized by the officers of the Wichita Falls Police Department in each and every search and seizure, including those searches that were conducted before, during and after the Zarnow searches. Additionally, Petitioner's claim that she "presented uncontroverted testimony of other veteran officers of the Wichita Falls Police Department who echoed that same procedure," is equally misrepresentative of the record. Petitioner presented NO evidence whatsoever to the district court or the Court of Appeals that Chief Coughlin formulated any specific procedure that was communicated to the officers directing them how to conduct searches and what evidence to seize during those searches. Nor is there ANY evidence that any officers conducted any specific searches and seizures in accordance with any policy or directive promulgated by Chief Coughlin. Rather, Petitioner attempted to extrapolate a custom of impermissible seizures that she alleges occur in each and every search conducted by the Wichita Falls Police Department solely from a few general statements given by Coughlin and other officers in depositions.

From deposition testimony of three officers, including Chief Coughlin, counsel for Plaintiff selected partial passages to construct a supposedly unconstitutional general approach to seizure by Wichita Falls Police Officers. Notably, the passages do not reference any specific incidents other than Zarnow. There is no evidence of numerous reports showing other claimed warrantless seizures or complaints by other citizens of any illegal seizures. Zarnow broadly claims that warrantless seizures must occur because all officers always seize everything using a "flawed plain view" doctrine. No such proof exists in this case. Zarnow did not sustain her initial burden to properly support her motion with evidence as to municipal custom. The only incidents referenced by Petitioner involved Zarnow.

Monell's requirement that municipal liability be premised on a custom or policy has consistently been followed to avoid the collapse of constitutional responsibility concepts into the *respondeat superior* framework. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Bd of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Petitioner's entire theory of the supposed existence of a municipal custom wrapped around the individual decision of "what to seize when" which is a case-by-case analysis made by an officer based on probable cause from the totality of the circumstances and training known to the officers at the time of the alleged seizure. Rejecting arguments of the nature made by Petitioner, the case law continually upholds *Monell's* required involvement of *municipal* action. Petitioner's attempts to make her municipal claim from individual conduct failed in the district court and on appeal to the Fifth Circuit.

Both Courts implicitly recognized that a finding that such testimony constituted in and of itself "custom evidence" would collapse municipal liability into nothing more than *respondeat superior* liability.

Petitioner's so called "custom testimony" misrepresents the statements contained in the record. Petitioner continues to try and perpetuate an "urban myth" in this case that an unconstitutional seizure occurs in every search. Although the myth began in Petitioner's early briefing and motions, it finds no true support in the actual record or in the actual testimony given by the officers.

During the course of deposing the Chief, Plaintiff's counsel asked for his explanation of the "plain view doctrine." The Chief stated in response:

> "Well, basically, if in the course or scope of an officer's duties they come across something that's sitting out in the open that would not – you know, would be obviously, say, something of a contraband nature or of an evidentiary nature or something of a particular crime, that's generally accepted that you don't – you can look at it and seize it if it's something that's there in plain view."

(PET. BRIEF 21)

Petitioner contends that these seven lines of deposition testimony constitute an unconstitutional policy by the City to direct the seizure of everything. The recitation is nothing but a personal paraphrasing of case law doctrine. To claim that this language establishes a policy that

directs officers to "seize everything" completely ignores that the specific language used in the Chief's answer which included a requirement that the item be "of a contraband nature" or evidence of a "particular crime." Arguing that this testimony supports a finding of unconstitutional "custom" (a widespread persistent pattern of conduct) when it is not connected to any specific incident, much less to a significant number of events, and it is not an instruction given to any particular officer at any particular time, simply stretches too far to meet the threshold of the first element required for a municipal custom.

This isolated passage is not evidence of any widespread persistent pattern of unconstitutional conduct that was (i) employed by the Chief on any specific occasion, (ii) regularly employed by other police officers in other instances, or (iii) representative of any instruction given to any police officers. It is one partial answer taken out of context and twisted by Petitioner to fill the void left by the total absence of any pattern of other alleged unconstitutional seizures by City police officers.

Petitioner also points to other snippets of the Chief's testimony where the Chief generally discusses his opinions concerning why certain evidence might be seized at a search. (PET. BRIEF 21-22). Nothing stated by the Chief in the context of the questions and answers supports that there is a general policy of seizing things without proper authority. In fact, the Chief references the authority relied upon in collecting items as specifically involving a court's authority to collect evidence with a warrant not a warrantless search or seizure situation.[3] (PET. BRIEF 22)

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3. R. 2846-47.

Although Petitioner attempts to take liberties with describing the testimony of Chief Coughlin, there is no evidence or testimony that Coughlin ever told, directed, or otherwise communicated to officers to seize Zarnow's property in contravention of the constraints of the "plain view" doctrine. Nor was there evidence presented that Coughlin ever espoused a policy, practice or required procedure for directing, or otherwise allowing the seizure of property not consistent with the "plain view" doctrine or any other applicable search and seizure laws. Petitioner cannot point to any testimony by Coughlin that the Police Department always seized items outside the scope of warrants or that it was the practice of the Police Department to "seize anything and everything" or the practice to "seize items and ask questions later." Coughlin never made such statements.

Petitioner attempts to bolster her custom argument and the statements of the Chief with general statements from two of the several original officers sued in this action. The actual statements of each officer regarding the plain view doctrine do not support the myth circulated by Petitioner's filings that an unconstitutional seizure occurs in every search conducted. Petitioner did not offer evidence of even one other incident of an unconstitutional warrantless seizure that occurred prior to Zarnow's seizures. She argues that because of the years of experience that the three officers possessed, this presents uncontroverted evidence of an unconstitutional custom. Petitioner cites deposition testimony as evidence that officers Dilbeck and Kendall could fairly be said to be familiar with Wichita Falls custom and common practice. (PET. BRIEF 21-23). These cited pages state nothing about any custom or practice, much less a specific custom or

practice of warrantless seizure. All of these references merely relate to the officer's length of service to the citizens of Wichita Falls.

Petitioner's supporting references make it clear that her position is – if an officer with this much experience did it, it must be the City's policy. This approach is nothing more than a "*respondeat superior*" argument in different clothing – an approach the courts have rejected since 1978. *Monell*, 436 U.S. at 694; *Bd of Comm'rs of Bryan County v. Brown*, 520 U.S. at 403; *City of Canton v. Harris*, 489 U.S. at 388; *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998), and reh'g denied, 149 F.3d 1181, cert. denied 526 U.S. 1083; *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (*en banc*).

Petitioner's valiant attempt to weave isolated deposition statements into pattern evidence of a widespread unconstitutional custom of the City seems a last futile effort to persuade this Court to ignore its own precedent. There is no evidence relating to an alleged unconstitutional seizure of property custom by the Wichita Falls Police Department, and no evidence of any incident other than the property seizure in the Zarnow case. Petitioner is asking this Court to find that the Fifth Circuit erred in finding that there was no genuine issue of a material fact as to a widespread and well-established City practice of seizing property without probable cause without any evidence of another instance in which a "warrantless seizure" was made. There was no evidence of a pattern of similar incidents injuring or endangering citizens. Supreme Court precedent mandates Plaintiff's "custom and practice" argument be rejected.

Only if Zarnow showed that his injury resulted from a "permanent and well settled" practice may liability attach for injury resulting from a custom of the City. *City of St. Louis v. Praprotnik*, 485 U.S.112, 127 (1988); *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970).

Petitioner asks that this Court "hold this petition pending a decision in *Connick*." This Court recently decided the *Connick* case in which it reaffirmed the requirement that a pattern of similar constitutional violations is ordinarily required to show an informal policy or custom. *Connick v. Thompson*, 131 S.Ct. at 1360-61. Petitioner has no such evidence and never presented any such evidence to the district court or to the Court of Appeals. Although *Connick* was a "failure to train" case, we agree with Petitioner that the "principles and the application of those principles are substantially similar" at least with regard to the requirement that a custom requires proof of a well-accepted, widespread practice that has been implemented in other similar situations. (PET. BRIEF 32).

Petitioner's attempt to argue that a "custom" need not be proved by evidence of other occurrences lacks all credibility in light of established municipal liability jurisprudence. Without proof of a recurring pattern, a claim based upon customary policy must fail. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) r'hng. denied, 735 F.2d 861, cert. denied, 472 U.S. 1016 (1985). It is clear that individual acts of officers in isolated incidents are not sufficient to bind the municipality unless they are accompanied by proof of persistent, widespread practices of objectionable conduct *predating* the involved incident so as to provide some basis for municipal responsibility.

Petitioner never presented any other evidence involving any objectionable conduct predating the Zarnow searches. Without such evidence, Petitioner's claim of a City custom must fail as custom requires more than the searches and seizures at issue.

IV. RULE 15(3) PERCEIVED MISSTATEMENT OF FACT OR LAW.

Throughout this Response, Petitioner's misstatements of fact and law have been referenced and pointed out by Respondents. Respondents request that this Court deny review because Petitioner relies on misrepresentations of both the procedural/factual background and the existence of a substantive conflict in the case authorities.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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